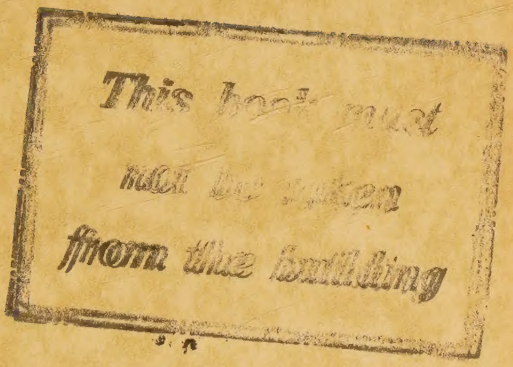
49 JACKSON LIBRARY - UNCG
3 0510 1583913 $

For Building Use Only

The Woman's College of
The University of North Carolina
Library

KFN
7445
N6
v.49


This book must
not be taken
from the building

Digitized by the Internet Archive
in 2025

https://archive.org/details/reportsofcasesat0004hami

N.C.

REPORTS

OF

CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

FROM DECEMBER TERM, 1856, TO AUGUST TERM, 1857,
INCLUSIVE.

[V. 49]

VOL. IV.

BY HAMILTON C. JONES.

Salisbury:
PRINTED BY J. J. BRUNER.
1857.

~~NC~~
KFN
7445
N6
v.49

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FREDERICK NASH, CHIEF JUSTICE.
HON. RICHMOND M. PEARSON.
HON. WILLIAM H. BATTLE.

JUDGES OF THE SUPERIOR COURTS.

HON. JOHN M. DICK,
" JOHN L. BAILEY,
" MATHIAS E. MANLY,
HON. DAVID F. CALDWELL,
" JOHN W. ELLIS,
" ROMULUS M. SAUNDERS,
HON. S. J. PERSON.

ATTORNEY GENERAL,
WILLIAM A. JENKINS, ESQUIRE.

108021

INDEX

TO THE NAMES OF CASES

VOL. IV.

Albritton, Purvis v. 170
Anders v. Anders 243
Andrews, Hardy v. 476
Archibald v. Davis 133
Atkins v. McCormick 274
Atwell v. McLure 371
Averitt v. Murrell 322
" v. " 323

Ballew, Gaither v. 488
Barrett v. Cole 40
Bartlett v. Simmons 295
Batten v. Faulk 233
Black v. Caldwell 150
Blake, Winder v. 332
Blanton v. Wall 532
Blum v. Stafford 94
Bohanan, Joice v. 364
Boothe v. Daughtry 87
Boykin v. Perry 325
Brady, Lancaster v. 79
Branch, Campbell v. 313
Brannock v. Bushinell 33
Bridges, Harrison v. 77
Bridger v. Freeman 1
Brittain, Waugh v, 420
Brower, Salem Man. Co. v. 429
Brown v. Brown 123
Brooks, Lea v. 423
Bruce v. Faucett 391
Bryson, Mathis v. 508
Burnett, Mizell v. 249
Burnett, Davis v. 71
Bushinell, Brannock v. 33
Bynum v. Rogers 399

Caldwell, Black v. 150
Campbell v. Branch 313
Carter v. Streator 62
" Spencer v. 287
Chasteen v. Phillips 459
Clark, Runyon v. 52
Cobb, Hoell v. 258
Coffield v. McLean 15
Cochran, Dewey v. 184
Cohoon v. Morton 256
Cole, Barrett v. 40
Cowles, Dula v. 519
Cotten, v. Davis 416
Couch v. Jones 402
Council, Williams v. 206
Cragie, Haws v. 394
Cuthbertson v. Long 444

Daughtry v. Boothe 87
Davis, Archibald v. 133
" v. Burnett 71
" Cotten v. 416
Dawes v. Taylor 499
Deaver, Smith v. 513
Dewey v. Cochran 184
Dey v. Lee 238
Dollar, Garrard v. 175
Dupree v. Dupree 387
Dula v. Cowles 519

Easley, Watkins v. 286
Eason, Smith v. 34
Edmondston, Kent v. 529
Elliott v. McKay 59
" v. Shelton 451
Estes v. Oxford 474

Faucett, Bruce v. 391

Faulk, Batten v. 233
Felton v. White 301
Flinn, Marshal v. 199
Forney v. Shipp 527
Fox, Pritchard v. 140
Fowle, Silverthorn v. 362
Freedle v. N. C. R. R. Co. 89
Freeman v. Bridger 1

Gaither v. Ballew 488
Gardner, Mayo v. 359
Garner v. Qualls 223
Garrard v. Dollar 175
Gibson v. Gibson 425
Giles v. Palmer 386
Gooch, Taylor v. 436
Gordon v. Wilson 64
Gray, Hyman v. 155
Green v. Kornegay 66
" v. Thornton 230
Griffin, White v. 139
" Williams v. 31
Gunter v. Watson 455
Gwynn v. Hodge 168

Hailey v. Wheeler 159
Harrison v. Bridges 77
Hardy v. Andrews 476
Hare v. Parham 412
Hartsfield v. Jones 309
Hatchell v. Kimbrough 163
Haws v. Cragie 394
Herring, Niblett v. 262
Herrin, Ward v. 23
Hinson, Louder v. 369
Hodge, Gwynn v. 168
Hodges v. Holderby 500
Hoell v. Paul 75
" v. Cobb 258
Hogue, Homesley v. 481
Holderby, Hodges v. 509
Hollingsworth v. Smith 270
Homesley v. Hogue 481
Howell v. Johnston 502
Houston v. Moore 522
Hunter, Pool v. 144
Hyman v. Gray 155

Ingram v. Ingram 188

Jacocks v. Newby 266
Johnston v. Sikes 70
" Watt v. 190
" v. Pendergrass 479
" Howell v. 502
Joice v. Bohanan 364
Jolly, Waldo v. 173
Jones, Couch v. 402
" Hartsfield v. 309
Journey v. Sharpe 165
Joyner v. Pool 293
Jus. of Harnett, McCoy v. 180

Kent v. Edmondston 529
Kerns v. Peeler 226
Kimbrough, Hatchell v. 163
Kimel v. Kimel 121
Kornegay, Green v. 66

Lancaster v. Brady 79
Largent, Reid v. 454
Laws v. Thompson 104
Lea v. Brooks 423
Leach, R. R. Co. v. 340
Lee, Dey v. 238
Little v. Lockman 494
Lockman, Little v. 494
Long, Cuthbertson v. 444
Louder v. Hinson 369
Lowe v. Sowell 235

McBryde, Parsons v. 99
McCormick, Atkins v. 274
McCoy v. Jus. of Harnett 180
McCurry v. McKesson 510
McIntosh, Wallace v. 434
McKay, Elliott v. 59
McKesson, McCurry v. 510
McKinley v. Scott 197
McLaurin, Underwood v. 17
McLean, Coffield v. 15
McLure, Atwell v. 371
McNair, Malloy v. 297
Malloy v. McNair 297
Mann v. Taylor 127

Mann v. Taylor 272
Marshall v. Flinn 199
Mathis v. Bryson 508
Mayo v. Gardner 359
Mears v. Speight 420
Mizell v. Burnett 249
Moore, Houston v. 522
" Shaw v. 25
Morris v. Rippy 533
Morton, Cohoon v. 256
Murrell, Averitt v. 322
" " v. 323
Murphy, Phillips v. 45

Neal, Pugh v. 367
" v. Wilcox 146
Newby, Jacocks v. 266
Newlin v. Osborne 157
Niblett v. Herring 262
N. C. R. R. Co, Freedle v. 89
Northern, Symons v. 241

O'Rorke, Rowland v. 337
Osborne, Newlin v. 157
Oxford, Estes v. 473

Palmer, Giles v. 386
Parham, Hare v. 412
Parsons v. McBryde 99
Paul, Hoell v. 75
Peeler, Kerns v. 226
Pendergrass, Johnston v. 479
Perry, Boykin v. 325
Phillips, Chasteen v. 459
" v. Murphy 45
Plummer, Warden v. 524
Pool, Joyner v. 293
" v. Hunter 144
Pritchard v. Fox 140
Propst v. Roseman 130
Pugh v. Neal 367
Purvis v. Robinson 96
" v. Albritton 170

Qualls, Gardner v. 223

Rail Road Co. v. Leach 340
Rail R. Co., Taylor v. 277
" " " Wesson v. 399
Reid v. Largent 454
Rippy, Morris v. 533
Roberts v. Watson 319
Robinson, Purvis v. 96
Rogers, Bynum v. 399
Roseman, Propst v. 130
Rowland v. O'Rorke 337
Rutherford, Stewart v. 485
Runyon v. Clark 52

Salem Man. Co. v. Brower 429
Sasser, Smith v. 43
Savage, Warbritton v. 382
Scott v. W. & R. R. R. Co. 432
Shaw v. Moore 25
" McKinley v. 197
Sharpe, Journey v. 165
Shelton, Edmondston v. 451
Shepherd, Smithwick v 196
Shipp, Forney v. 527
Sikes, Johnston, v. 70
Silverthorn v. Fowle 362
Simmons, Bartlett v. 285
" Stephenson v. 12
Smithwick v. Shepherd 196
" Wakefield v. 327
Smith v. Eason 34
" Sasser v. 43
" v. Deaver 513
" Hollingsworth v. 270
Sowell, Lowe v. 235
Speight, Mears v. 420
Spencer v. Carter 287
Stafford, Blum v. 94
State v. Bond 9
" v. Boon 463
" v. Burk 7
" v. Cress 421
" v. David 353
" v. Dibble 107
" v. Freeman 5
" v. Guilford 83
" v. Harriet 266
" v. Harvell 55
" v. Hopkins 305

State v. Ingold 216
" v. McDonald 19
" v. Mott 449
" v. Privett 100
" v. Ross 315
" v. Shaw 440
" v. Stanly 290
" v. Wright 308
" v. Whit 349
Stephenson v. Simmons 12
Stephenson v. Stephenson 472
Stewart v. Rutherford 485
Stowe, Wright v. 516
Streator, Carter v. 62
Symons v. Northern 241

Taylor, Mann v. 127
" " v. 272
" v. Gooch 436
" v. R. R. Co. 277
" Daws v. 499
Thompson, Laws v. 104
" v. Whitman 47
" Vanover v. 485
Thornton, Green v. 230
Turner v. White 116

Underwood v. McLaurin 17
Vanover v. Thompson 485
Vinson, Washington v. 380

Wakefield v. Smithwick 327
Waldo v. Jolly 173
Wallace v. McIntosh 434
Wall, Blanton v. 532
Warbritton v. Savage 282
Ward v. Herrin 23
Warden v. Plummer 524
Washington v. Vinson 380
Watkins v. Easley 286
Watt v. Johnston 190
Watson, Gunter v. 455
" Roberts v. 319
Waugh v. Brittain 420
Wesson v. R. R. Co. 399
Wheeler, Hailey v. 159
White v. Griffin 139
" Turner v. 116
" Felton v. 301
Whitman, Thompson v. 47
Wilcox, Neal v. 146
Williams v. Council 206
" v. Griffin 31
W. & R. R. R. Co., Scott v. 432
Wilson, Gordon v. 64
Winder v. Blake 332
Wright v. Stowe 516

CASES AT LAW

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1856.

JOHN FREEMAN *vs.* ROBERT M. BRIDGER.

Timber furnished to an infant to enable him to build a dwelling on his land, is not a *necessary*.

An infant, who has a guardian, cannot contract for necessaries.

THIS was an action of ASSUMPSIT, commenced by attachment, and tried before SAUNDERS, Judge, at the Fall Term, 1855, of Bertie Superior Court.

The defendant pleaded "general issue and infancy;" to the latter plea, the plaintiff replied that part of the articles furnished were necessaries.

The action was brought for the price of timber furnished by the plaintiff to the defendant for the building of a house, and for other articles. The defendant was an infant at the time those articles were furnished, and lived with his mother. He had at that time a guardian, who took no control over him or his property. Before these articles were furnished to him he had married and had a child, and the house, for the build-

ing of which the timber was bought, was for the residence of himself and his family, and he was residing in it at the time of the trial. It was conceded at the trial, that the articles charged, to the amount of fourteen dollars, were necessaries suitable to the condition in life of the defendant, and that the value of the timber delivered was $55. It was proved that he owned no other house, and that the one built was suitable to his estate and station in society, and such a one as is usually occupied by prudent and economical young men just setting out in life with estates like that of the defendant.

His Honor charged the jury, that the defendant was bound to pay for the timber in question. For which the defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Winston, Jr., for the plaintiff.

No counsel for the defendant.

Pearson, J. An infant is presumed not to have sufficient discretion to enable him to transact business and make contracts. So, the general rule is, that the contract of an infant is not binding on him. The exception is, that an infant is bound to pay for goods sold and delivered to him, provided they are necessary for his support. This is put on the ground, that unless an infant can get credit for "necessaries" "he may starve"; or as it is expressed in some of the cases, "an infant must live, as well as a man, therefore, the law gives a reasonable price to those who furnish him with necessaries *ad victum et vestitum*, i. e. for victuals and clothes." Lord Coke says, Co. Lit. 172, a, "It is agreed by all the books, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and such *other* necessaries." These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling, and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, &c., a

restriction is added, that it must appear that the articles were suitable to the infants degree and estate.

This is familiar learning, but in making the application, it is proper to bear in mind the principle upon which the exception is made. His Honor was of opinion that a contract for fifty-five dollars worth of timber, for the purpose of building a house, made by the defendant while an infant living with his mother, fell within the exception, inasmuch as the timber was used for building a house on the infant's land "suitable to his estate and station in society," and "such as are usually occupied by prudent economical young men just setting out in life with estates like the defendant's"; it also appearing that he had married, and was living in the house with his wife and child at the time of the trial.

We agree, that if an infant marries, the principle of the exception extends to his wife and child. They are to be furnished with necessary food and clothing; for there is no more reason why they should "starve" than the infant himself; but in regard to the timber, and the necessity for building a house, we differ with his Honor.

The plaintiff's counsel was unable to cite any authority, or even a *dictum*, in support of his Honor's opinion, and it is manifestly against the reason of the thing. If the infant is bound to pay for the timber, he must pay for the nails, glass, &c., the wages of the workman; in other words, for the whole house; and if this be so, on the ground that it is necessary for him to have a house to live in, it follows that he must pay for a horse, a wagon, a plough, &c.; because such things are necessary to enable him to cultivate his land; then would follow a few cattle and hogs; so, the result would be to make the exception broader than the general rule, and take from infants that protection which the law considers they stand in need of, by reason of their want of discretion.

There is another fact set forth in the case which makes the decision erroneous, not only in respect to the timber, but in respect to the fourteen dollars worth of articles admitted to be necessaries, if the defendant's counsel had insisted upon

the objection as to them: The defendant, at the time the articles were contracted for, *had a guardian.*

While an infant lives with a parent, he cannot bind himself even for necessaries, unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, &c., as the parent considers necessary, "for no man shall take upon himself to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom." *Bainbridge* v. *Pickering*, 2 Blackstone's Rep. 1325.

"Guardians for infants are presumed to furnish all necessaries, and a stranger who furnishes board, or any thing else, must, except under peculiar circumstances, take care to contract with the guardian." *State* v. *Cook*, 12 Ire. Rep. 67; *Hussey* v. *Roundtree*, Busb. Rep. 110; *Hyman* v. *Cain*, 3 Jones' Rep. 111; *Richardson* v. *Strong*, 13 Ire. Rep. 106; *Downey* v. *Bullock*, 7 Ire. Eq. Rep. 102. These cases settle the rule, that where there is a guardian, the replication "for necessaries" does not avoid the plea of "infancy"; because the fact of there being a guardian, whose duty it is to furnish all necessaries for the support of the ward, shows that it was not necessary for the infant to contract. To allow him to do so, would defeat the provision which forbids guardians to exceed the income of their wards, and in fact, would put the ward beyond the control of his guardian. It is stated in this case that the guardian assumed no control over the defendant. That does not prove that it was not his duty to do so. But if an infant may contract for timber, build houses, and stock his farm with horses, cattle, &c., it is idle to talk about the control of his guardian. The fate of this defendant (for we see from the record, that this action was commenced against him by attachment, as an absconding debtor,) proves the wisdom of the law and the need infants have of its protection.

PER CURIAM. *Venire de novo.*

STATE *vs.* RACHEL FREEMAN.

Where evidence of facts not pertinent to the issue, was admitted, upon the assurance of the prosecuting officer, that he would introduce other facts and circumstances to connect the prisoner with the facts deposed to, and no such connecting facts were produced, it was error in the Court to leave such evidence to be considered by the jury.

INDICTMENT for ARSON, tried before his Honor, Judge DICK, at the Fall Term, 1856, of Cumberland Superior Court.

This case is sufficiently stated in the opinion of the Court.

Bailey, (*Attorney General*) for the State.
Dargan, for the defendant.

NASH, C. J. The prisoner is entitled to have her case submitted to another jury. The indictment is for burning the dwelling-house of Abraham Whitfield. She is a free woman of color, and the indented servant of Mr. Whitfield. The case is silent as to any direct evidence of the prisoner's guilt. To show that she was guilty, the prosecuting officer offered to prove that two previous attempts had been made to burn the same house; one about the middle of January preceding the actual burning, and the other, on the night of the 24th of February, the day previous thereto. The introduction of this evidence was objected to by the counsel of the prisoner. The prosecuting officer then stated that "he expected to prove facts and circumstances, tending to show, that the prisoner was the person who made the attempts each time." Upon this statement the evidence was admitted. Stript of the promise made by the State, to connect the prisoner with the attempts, there can be no doubt that the proof of them was inadmissible. See *Bottoms* v. *Kent*, 3 Jones' Rep. 154. Indeed, the connecting facts were the sole grounds upon which his Honor would have admitted the proof of the attempts. They were in the nature of a condition precedent. What are the facts upon which the State relied to connect the prisoner with them? Simply, that she was a servant in the family at

the time the attempt was made. We are considering the case as it appears before us. Mrs. Whitfield, the wife of Mr. Whitfield, stated that the prisoner was employed by her as a house servant, and that there was another servant girl by the name of Lavinia, whose duty it was to make up the bed in her room, and to sweep out the house, and after that was done, it was the duty of the prisoner to dust the furniture in the room, &c. About 10 o'clock, on the morning of the day when the first attempt was made, which was about the middle of January, while sitting in the usual sitting-room on the first floor, her bed-room being in the second story, she smelt something burning, and upon going into the passage, she found smoke issuing from the upper story and coming down the stairway. The prisoner was then standing on the piazza, near the door, and apparently looking up the street. She then describes where she found the fire. What was there in this statement to connect the prisoner with the attempt? Nothing but the simple fact, that she was a member of the family, and not the only one of the servants who had access to the room. Certainly, there was not more to connect her than to connect Lavinia with it.

Let us see if there is any thing in the case connecting the prisoner with the second attempt, made on the 24th of February. The same witness states that she and her husband were in the sitting-room, the prisoner also being there; she was sent into the back yard for some purpose, and on returning into the house, said she had seen a man in the yard. After a short time, the prisoner asked her and her husband if they did not smell smoke. She and her husband went immediately into the yard, the prisoner following; when they got out, they smelt something burning, but saw no fire. After looking about for some time, the prisoner remarked that it could not be in aunt Bella's room, for she had locked her door in the morning and gone away, and had not returned. Her master remarked, he thought it was in Bella's room, and started to go there, when the prisoner ran by him to the room, pulled open a window, and immediately exclaimed, "here is the fire."

We would again ask, what is there in this statement to show any complicity of the prisoner in this second attempt? She went into the back yard at the command of her master; is the first to draw the attention of her master and mistress to the smell of fire; the first to mention Bella's room, and the first to discover the fire while they were looking for it in vain.

In admitting the evidence of these previous attempts, under the circumstances, his Honor acted rightly, but the State did not redeem its pledge, and the evidence ought to have been withdrawn by the Court from the attention of the jury—certainly as to one of the attempts, if not as to both. On the contrary, by suffering the jury to consider it, his Honor added to it the weight of his authority, and thereby suffered them to be misled by such irrelevant testimony. For this error, we think the prisoner is entitled to have her case submitted to another jury.

PER CURIAM. Judgment reversed.

STATE *vs.* HENRY BURK.

To constitute the offence of harboring a runaway slave, it is not necessary that, at the time of first receiving the slave, the defendant conceived the purpose of fraudulently harboring, if his acts afterwards plainly evinced such a purpose.

THIS was an INDICTMENT for harboring a runaway slave, tried before his Honor, Judge BAILEY, at the Fall Term, 1856, of Chowan Superior Court.

On the trial below, it was in evidence, that the slave in question had run away from his master's service on Saturday, and that on Monday, Mr. Small, the owner, proceeded, after night, to the house of the defendant, and knocked several times without any response; that he then threatened to break the door, when the defendant got up from his bed and opened

it. He asked the defendant, who were there; to which he answered, no one but himself, his wife and her sister. On this, the witness searched the house and found his slave under the defendant's bed. He asked him why he had his boy harbored, when he knew he was runaway; he answered that the boy had come to him that night, and asked him to let him stay there till morning, when he was going to give himself up to his master. There was no other material evidence.

His Honor charged the jury, that to convict the prisoner upon the count for harboring, it must be proved, to their satisfaction, that the slave was runaway, and that the defendant knew it at the time of the alleged harboring.

The defendant's counsel requested the Court to instruct them further, that if the defendant, when he admitted the slave to his house for the night, believed that he intended to return to his master in the morning, it was not a fraudulent harboring under the statute.

This instruction the Court refused to give; whereupon the defendant excepted.

Verdict and judgment for the State. Appeal.

Bailey, (*Attorney General*) for the State.
Heath, for the defendant.

Battle, J. The charge given by his Honor, to the jury, as to the testimony necessary to be shown to prove the defendant's guilt was correct, and we do not understand that any objection is made to it. It assumes the propriety of the construction of the statute in relation to the harboring of runaway slaves, (Rev. Code ch. 34, sec. 81,) which was adopted by the Court in *Dark* v. *Marsh*, 2 Car. L. Repos. 249, and followed in *Thomas* v. *Alexander*, 2 Dev. and Bat. Rep. 385. But the counsel for the defendant contends that his Honor ought to have instructed the jury, that if the defendant, at the time when the slave came to his house, believed that he intended to return to his master the next morning, he was not guilty of the offence of harboring him. Such an instruction would

have withdrawn from the consideration of the jury the effect of the testimony as to the defendant's conduct at the time when the master came to search his house. The defendant may not have intended at first any fraudulent concealment of the slave, and yet have afterwards changed his mind. The instruction prayed seems to imply that there could not have been any such change of purpose, and in that respect it would have been erroneous, and was, therefore, properly refused. The testimony, if believed, was sufficient to justify the jury in finding that the defendant did fraudulently conceal the slave from his master, for a short time at least, and that was enough to establish his guilt.

PER CURIAM. Judgment affirmed.

STATE *vs.* HENRY A. BOND.

A person cannot be convicted under the 34 ch. sec. 90 of the Revised Code, making a principal liable for the act of his agent, for an act done between the passing of the Revised Code and the time of its going into operation.

INDICTMENT for unlawfully trading with a slave, tried before BAILEY, Judge, at the last Superior Court of Chowan.

The jury below found the following special verdict: "That a slave, on the 10th day of October, A. D. 1855, in the night time, about the hour of 8 o'clock, went to the shop of the defendant, where spirituous liquors, as well as other goods, were sold, and received from the hands of a slave, belonging to the defendant, a small tin bucket, containing one quart of whiskey, which he brought out of the store, and that the defendant was not present at the time: that the defendant's slave above mentioned had authority to weigh, measure and deliver, goods sold in the store to customers other than slaves, but not to receive payment." Upon this special verdict, the Court pro-

nounced judgment in favor of the defendant, from which the solicitor for the State appealed.

Bailey, (*Attorney General*) for the State.
Heath, for the defendant.

Battle, J. The defendant was indicted for selling spirituous liquor to a slave contrary to the statute in such case made and provided. The alleged offense was found to have been committed on the 10th day of October, 1855, at a time when the testimony, which the State was able to produce, was not sufficient, in law, to justify a conviction. The 90th section of the 34th chapter of the Revised Code, which was enacted at the session of the General Assembly held in 1854, but was not to go into operation until the first day of January, 1856, provides as follows: "Every species of unlawful trading with a slave, which is forbidden by this chapter, shall, when done by the agent or manager of another in the course of the business in which he is employed, be deemed to have been done by the consent and command of his principal or employer, unless the contrary be proved," &c. Upon the finding of the facts set forth in the special verdict, the Attorney General contends that by the effect given to the evidence by this section, the guilt of the defendant is clearly established, while it is insisted for the defendant that, as to him, the enactment is an *ex post facto* law, and therefore void, both by the 24th section of our Bill of Rights, and by 10th section of the 1st Article of the Constitution of the United States. We are entirely satisfied that the objection taken by the defendant's counsel is valid, and that if the section of the 34th chapter of the Revised Code to which we have referred, were intended to operate upon cases like the present, (which may well be doubted,) it is an *ex post facto* law within the meaning of the Constitution. What such a law is, we are not left now to ascertain. In the early case of *Calder* v. *Bull*, 3 Dallas 386, (1 Curtis 269,) before the Supreme Court of the United States, Mr. Justice Chase defined an *ex post facto* law, within the

view of the Constitution, to be as follows: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was before it was committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." The prohibitory clause of the Constitution of the United States, of which this was an exposition, is in these words: "No bill of attainder or *ex post facto law* shall be passed: Art. 1, sec. 9, clause 3. This prohibition applied to Congress, and in the first clause of the next succeeding section, (10) a similar one was applied to each State. Before the adoption of the Federal Constitution, the 24th section of our Bill of Rights had declared, "that retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty, wherefore, no *ex post facto* law ought to be made." The definition given by Judge CHASE of an *ex post facto* law within the purview of the Constitution of the United States, has been adopted by the most eminent jurists and writers on American Law. 1 Kent's Commentaries 409; 3 Story's Com. on the Constitution 212. It seems to have been sanctioned by this Court as equally applicable to the term as used in our Bill of Rights; *Dickinson* v. *Dickinson*, 3 Murp. Rep. 327. The propriety of the first three parts of the definition is so obvious, that no intelligent mind can be found to dispute it. A very little reflection will satisfy the candid enquirer, that the fourth part is within the spirit, if not so manifestly within the letter, of the prohibitory clause in question. In a judicial enquiry, no allegation can be taken as a *fact*, unless it be admitted or proved. Unproved, it is the same as if it did not exist. Hence the maxim *de non apparentibus et de non existentibus eadem est ratio*. If, then, a person be charged with

the commission of an act which can be proved by testimony only of a particular kind or grade, and afterwards a law is passed for the purpose of admitting less testimony, with the view to make a conviction more easy, surely the alleged offender will be just as liable to be unjustly punished, as he would be under either of the other meanings of an *ex post facto* law. The case of treason, in which two witnesses to the same overt act, or confession in open Court, are necessary to a conviction, may afford an instructive example of how much a person, obnoxious to government, would be exposed to oppression, if a subsequent law could dispense with one witness or a confession in open Court. Such laws were sometimes passed in the Mother Country, prior to our Revolution, and we have strong reasons for believing that they were in the contemplation of those patriots and statesmen, who, in much wisdom, framed our State and Federal Constitutions. We are satisfied then, that a law which alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law, within the prohibition of the Constitution. It does not follow by any means, that a law which merely changed the mode of proceeding, would be liable to the same objection. The Legislature may lawfully change the remedy, but cannot, by any subsequent act, interfere with the offense, so as put in greater peril the alleged offender. The judgment in favor of the defendant, upon the special verdict, was right, and must be affirmed.

PER CURIAM. Judgment affirmed.

MARTIN STEVENSON *vs.* SAMUEL A. SIMMONS.

A stockholder in a bank is not a competent witness to establish a debt due to the bank.

This was an action of ASSUMPSIT to recover a debt due to the Bank of Washington, tried before his Honor, Judge MANLY, at the Fall Term, 1856, of Beaufort Superior Court.

The plaintiff is the cashier of the bank of Washington. All notes of this bank are made payable to the cashier, and the note, out of which this debt grew, was thus made payable. It was executed by one Sutton, and means had been put into defendant's hands to pay the debt at its maturity. And it was alleged in the declaration, that notice had been given to the defendant that he was held liable, and that he agreed to pay.

The only question in the case was, whether one Hoyt, who was president of the bank, and also a stockholder in the same, was competent, as a witness, to prove the debt. His Honor admitted the evidence, subject to the opinion of the Court thereafter to be given. A verdict was taken for plaintiff, with an agreement, that if the opinion of the Court should be against the plaintiff, he would submit to a nonsuit.

On considering the question reserved, his Honor was of opinion adverse to the plaintiff, who thereupon took a nonsuit and appealed.

Shaw, for the plaintiff.
Rodman, for the defendant.

NASH, C. J. In this case there is no error. The witness Hoyt was incompetent to testify in favor of the plaintiff. The action, though in the name of Stevenson, is, in fact, the action of the Bank of Washington, of which he is the cashier. Notes discounted in bank are made payable, not to the bank as a corporation, but to their cashier; the object being to remove all difficulty as to venue in suing on them. Of the bank of Washington Mr. Hoyt was a corporator. It is the common learning in questions touching the competency of witnesses, that one who is interested in the subject-matter in dispute, is incompetent to sustain his interest. And it is a general rule, if the effect of a witness's testimony will be to create or increase a fund, in which he is, or may be, entitled to share, he

is not competent. *Hudson* v. *Revitt*, 5 Bing. 368; *Owens* v. *Collinson*, 3 Gill. and John. 25, and the numerous cases brought together by Cowan and Hill's notes—note 108, page 116, part 1st. Here, the effect of Mr. Hoyt's testimony was directly to increase the funds of the bank of Washington, by the amount sought to be recovered by his testimony. He was then increasing a fund in which he was entitled to participate.

To this proposition it is replied, that a corporator *ex necessitate* must be admitted, or the bank would often be defrauded of its rights.

General laws are made for the community at large, and not for particular individuals or bodies of men, and they are not to be turned aside to suit any private interests.

The common law has established on this subject, a wide difference between a public and a private corporation. Of the former, are towns, counties, villages and others, formed for municipal purposes. The State itself is a municipal corporation. The individuals constituting such corporations, have always been admitted as witnesses for the corporation, (the witnesses having no individual interest and from absolute necessity). Refuse to admit them, and the wheels of government must stop. The State could collect no debt due to it where the debtor refused to pay; for the same interest which sets aside the witness, would disqualify him as a juror; for every citizen is a corporator. The doctrine is summed up by the Supreme Court of Ohio, in *The Methodist Episcopal Church of Cincinnati* v. *Wood*, 5 Ham. 583. But if the corporation be for private purposes, as a bank, or turnpike company, one corporator is incompetent as a witness for his brother corporators. *Eustice* v. *Pinkham*, 1 New-Hampshire Rep. 275; *Union Bank* v. *Rigeley*, 1 Har. and Gill 324, 408. The whole doctrine was learnedly discussed in the case above referred to, (*Meth. Epis. Church, &c.*, v. *Wood*,) and the Court concluded as follows: "Where corporations of a private nature, instituted for special purposes, and private emolument, such as banks, &c., bring suit, the interest of the

corporators is direct, and they are incompetent to testify in support of their claim."

There is no error, and judgment of nonsuit affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM H. COFFIELD *vs.* HECTOR McLEAN.

Before the land of an infant can be sold for debt, under the petition of his guardian, there must be a judgment of Court, that there was a debt against the estate of the ward.

It must also be alleged in a petition, for selling an infant's land, that the debt to be satisfied, was one against the ancestor, and not simply a debt contracted by the ward or his guardian.

ACTION of EJECTMENT, tried before his Honor, Judge PERSON, at the Fall Term, 1856, of Cumberland Superior Court.

William H. Coffield, the plaintiff, was the owner of the land in question in 1841; he was then a minor, and was such at the time of bringing this suit; his guardian, one Bennett, filed the following petition: "The petition of Furney Bennett, guardian of William H. Coffield, minor, under the age of 21 years, * * * showeth that his ward, William H. Coffield, is indebted to the amount of $216 and upwards; that he has no assets in hand to pay off and discharge this debt, and that there is not personal property enough in his hands to discharge the same." Upon this petition, a sale was ordered and duly made in pursuance thereof, and the defendant became a purchaser at the sale of the same, and took a deed for the premises. The question was as to the sufficiency of the proceedings and the validity of the sale under these circumstances.

His Honor, upon the foregoing case, which was agreed by the counsel, was of opinion that the plaintiff was entitled to recover. From which judgment, the defendant appealed to the Supreme Court.

Moore and *Strange* for plaintiff.

W. A. Wright and *Bryan*, for defendant.

PEARSON, J. The sale was void, because it does not appear that the County Court passed on and ascertained the fact, that there was a debt or demand against the estate of the ward. *Spruill* v. *Davenport*, 3 Jones' Rep. 42; *Pendleton* v. *Trueblood*, Ibid. 96.

But there is another fatal objection. The petition does not allege that there was a debt or demand *against the estate* of the ward. The allegation is, that the *ward is indebted* to the amount of $216, and the guardian has no assets, and there is no personal property out of which the debt can be paid. There is a material difference between a personal debt of the ward and a debt against the estate of the ward; i. e., a debt of the *ancestor*, for which the land of the ward is liable. It is manifest, by a perusal of it, that the statute under which this proceeding was had (Rev. Stat. ch. 63) is, as its title shows, "A mode of subjecting the land of deceased debtors to the payment of their debts," and consequently does not extend to personal debts contracted by, or on account of, infants. At common law, an heir sued for the debt of his ancestor, might pray the *parol to demur* until he arrived at full age. The statute changes this by substituting a provision, that no execution shall issue against the land of heirs, who are under age, until after the expiration of one year, during which time, it is the duty of guardians, under the 11th section of the Act, to apply for an order of sale.

It was stated at the bar, that the debt for which the land was sold, was contracted in prosecuting or in defending a suit for or against the infant. So, if was not a debt of the ancestor, but was a personal debt of the ward; and the defendant's title is bad, not for a mere omission of the proper entries by the Court, but upon the merits, because upon the facts, the County Court had no power to order a sale. There is no error.

PER CURIAM. Judgment affirmed.

THOMAS R. UNDERWOOD *vs.* DUNCAN McLAURIN.

It is error in a Court to rescind an entry made on a previous day of the same term, which truly states a fact that did occur.

APPEAL from the Superior Court of Cumberland, his Honor, Judge PERSON, presiding.

The case was agreed as to the facts, and was as follows: The defendant, Duncan McLaurin, was the bail of one McDuffie, and a *sci. fa.* issued against him as such, returnable to the County Court of Cumberland. At the return term of the *sci. fa.*, the defendant put in pleas to the same, which accordingly stood over to the next term. On Monday of the next term the defendant brought in his principal and surrendered him in discharge of himself as bail, and this record was then made. "The principal, N. K. McDuffie, is surrendered in open Court by Duncan McLaurin, his bail, in discharge of himself on Monday of this term;" whereupon, the said McDuffie was permitted go without day on the payment of costs. Afterwards, on the same day, the plaintiff's counsel gave notice, that he would move, during the term, to set aside the proceeding aforesaid, because the plaintiff had not been notified that the surrender would be made. The motion was accordingly made on Friday of the term, and on considering the same, the said County Court adjudged, "that the order accepting the surrender of N. K. McDuffie, in the case of T. R. Underwood v. Duncan McLaurin, bail of said McDuffie, in discharge of his bail, be rescinded, and the case stand on the trial docket as before, without prejudice to the defendant." The ground upon which this order was made, was as follows: The defendant's counsel had told the plaintiff's counsel, that his client would surrender McDuffie, in open Court, as soon as the Court was through with the business in hand. While the business still occupied the Court, the plaintiff's counsel enquired of the Court, whether any other business would be taken up before dinner than that in which they were engaged, and he was informed that none other would be taken up be-

fore dinner. Whereupon the plaintiff's counsel retired from the Court to his chamber, and had no cognizance of the proceeding complained of. The surrender was made in open Court before dinner, and the principal, McDuffie, on being discharged, immediately went out of reach of his bail, and was beyond his reach when this motion was made.

From this order of the County Court to rescind the previous proceeding, &c., an appeal was taken to the Superior Court, where, on consideration of the case agreed, his Honor, Judge Person, reversed the order of the County Court; from which the plaintiff appealed to the Supreme Court.

Shepherd and *J. Winslow*, for plaintiff.
McKay, for defendant.

Battle, J. When the defendant surrendered his principal in open Court in discharge of himself as bail, he was acting in the clear exercise of an undoubted legal right. 1 Rev. Stat. ch. 10, sec. 4; Rev. Code ch. 11, sec. 5; *Moody* v. *Stockton*, 3 Dev. Rep. 431. The entry of the fact made upon the records of the Court was therefore proper, and the Court could not, by their subsequent action, deprive the defendant of the benefit of it. Their attempt to do so by rescinding the entry, was an error, which he had a right to have corrected in the Superior Court, upon his appeal to that Court. *Williams* v. *Beasley*, 13 Ire. Rep. 112; *Murphrey* v. *Wood*, 2 Jones' Rep. 63.

There is nothing in the case of *Williams* v. *Floyd*, 5 Ire. Rep. 649, relied upon by the plaintiff's counsel, which militates, in the least, against these positions. In that case the only question was whether, under the circumstances therein stated, the plaintiff was entitled to a judgment against the defendant and the sureties to his appeal bond. It seemed to be admitted on all hands, that the sureties for the defendant's appearance had been discharged by their surrender of him in the County Court.

The judgment of the Superior Court is affirmed, which will be certified as the law directs.

PER CURIAM. Judgment affirmed.

STATE *vs.* DANIEL McDONALD.

If a man deliberately kill another to prevent a mere trespass on his property, (whether that trespass could or could not be otherwise prevented,) he is guilty of murder.

INDICTMENT for MURDER, tried before his Honor, Judge DICK, at the last Superior Court of Bladen.

The charge was for the murder of one Neil Ferguson. Flora McDonald, the mother of the prisoner, and also the mother of the wife of the defendant, had lived for many years with her son, the prisoner, upon the plantation where the homicide was committed. About two or three months before this event she removed from the house where she had lived, to that of the deceased, leaving the prisoner in the sole possession of the first named premises. The deceased occupied a part of the same plantation with the prisoner, agreeing to cultivate corn on it for his mother-in-law. An agreement was made between the prisoner and the deceased to run a dividing fence between their respective parts. In making this fence, which was done by them jointly, the rails of one side of the lane, which was on the part in the possession of the deceased, were used. Along this old lane there were piles of dirt raked up for manure.

One *Daniel Ferguson*, a son of the deceased, stated, that on the day of the homicide, he went, by the order of his father, to haul out the manure; that while loading his cart he saw the prisoner sitting in the door of his dwelling, some ten or fifteen paces off, who told him not to take the manure. About this time the deceased came up, and the prisoner asked

him if he had instructed witness to haul off the manure; to which he replied, that he had. The deceased then asked the prisoner, who made the gap in the dividing fence, to which he replied, it was a negro woman. The witness then moved off with his cart, leaving the defendant still sitting in his door and the deceased standing near the gap in the dividing fence; after proceeding about sixty paces he heard the report of a gun, and on looking round, saw his father falling on the rails of the fence taken out for a gap, and the defendant going into his house with his gun in his hand. At the request of the deceased, the witness dragged him into a shade near by. A negro woman asked the prisoner if he had given the deceased any notice that he was going to shoot him; to which he replied, yes, my gun snapped.

Catharine Ferguson, the widow of the deceased, testified, that when she and her children got to her husband he was not dead, but he could not speak. The defendant said he had killed him, and if his gun was loaded, he would lay her by the side of him. The children of the deceased were crying around him, when the prisoner came out of his house with a stick in his hand and ordered them off. Witness directed a negro woman to wet the lips of the deceased with water; the prisoner struck her a blow on the head with his stick, which brought her to her knees. He struck her a second blow on the head. He then stood over the body with his stick in hand, and ordered them all off.

Robert Toler said, that when he arrived, about an hour after the discharge of the gun, the deceased was dead. The prisoner called him to him, and asked him if it was not a shocking come off, to which witness replied, it was. Defendant then asked, if the deceased was dead, to which he answered, that he was. He then said I shot him. Witness asked him why he did it. He replied, "because he had promised to put up a gate and had not done it." Witness said it must have been liquor that caused it. Defendant said no, it was not liquor, for he had determined to kill him for some time past.

John Budd was next examined. He stated that about two weeks before the homicide the defendant was at witness's house, when he said, Neil Ferguson was a mean man, and had ruined him by taking his mother away from him. Witness replied, that "he thought it was best for the old woman to have Ferguson's wife and daughter to wait on her," when defendant again said, "Ferguson was a mean man and should not live two weeks."

Defendant offered no evidence.

Defendant's counsel asked the Court to instruct the jury, that the hauling away of the manure was a trespass, and being done by the command of the deceased, it amounted to legal provocation, and mitigated the killing from murder to manslaughter. The Court declined giving such instruction; for which defendant's counsel excepted.

The Court allowed the witness, Daniel Ferguson, to state the question propounded to the prisoner by the negro woman, which was also excepted to.

Verdict, guilty of murder. Judgment and appeal.

Attorney General (*Bailey*) and *Winslow*, for the State.
White, for the defendant.

Battle, J. One of the grounds upon which the motion for a new trial was made in the Court below, to wit, that the witness, Daniel Ferguson, was permitted to state that a negro woman asked the prisoner if he gave the deceased any notice before he shot him, has been properly abandoned in the argument here. The State certainly had a right to prove the declaration of the prisoner, whether called out by a question from a negro or any other person.

The other ground assumed for the defense, and which alone is relied upon in this Court is, that at the time when the prisoner shot and killed the deceased, the latter was in the act of committing a trespass by carrying off his manure, and that thereby the homicide was mitigated from murder to manslaughter. For this position, the counsel cited Hale's P. C. page

485, where it is said, that "if A, pretending title to goods, take them from B, B may justify beating A, but if A dies, it is manslaughter only."

Whether the deceased was, in fact, committing a trespass upon the property of the prisoner at the time when he was killed, and if he were, whether the prisoner could avail himself of it, as he assigned a different cause for the killing, it is unnecessary for us to decide. Admitting both of these enquiries to be decided in favor of the prisoner, the homicide is still, according to the highest authorities, murder, and murder only. *State* v. *Morgan*, 3 Ire. Rep. 186. See also Wharton's American Law of Homicide 185, where Hale, Hawkins, Foster, and many adjudicated cases are referred to. There will also be seen an explanation of the cases like that cited by the prisoner's counsel from Hale. "To extenuate the offense in such case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and to deter the offender from repeating the like, and it must so appear. For, if A had knocked out the brains of the deceased with a bill, or hedge-stake, or had given him an outrageous beating with a cudgel, beyond the bounds of a sudden resentment, whereof he had died, it would have been murder." The doctrine on this subject is so clearly and forcibly stated by Judge Gaston, in delivering the opinion of the Court in the above cited case of the *State* v. *Morgan*, that we beg leave to refer to it, and to adopt it as a part of our opinion in the present case. "It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty in taking, or endeavoring to take, the life of a fellow being in order to save one's self from a comparatively slight wrong, which is essentially wicked, and which the law abhors. You may not kill because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. Thus, an officer, acting

under a legal process, has a right to arrest the person against whom it is directed, and to retake him if he break custody, and for such purpose he may, and ought to, use necessary force; yet, if the process be in a civil case, or a misdemeanor only, and the officer, although he cannot otherwise arrest or retake his prisoner, intentionally kills him, it is murder. 1 Hale 481; Foster 271; 1 East P. C. ch. 5, secs. 306, 307. The purpose, indeed, is rightful, but it is not one of such paramount necessity, as to justify a resort to such desperate means. So, it is clear, that if one man deliberately kill another, to prevent a mere trespass on his property—whether that trespass could or could not be otherwise prevented—he is guilty of murder."

Let it be certified to the Superior Court of Bladen county, that there is no error in the record.

PER CURIAM. Judgment affirmed.

Doe on demises of JOHN WARD *et al. vs.* WILSON B. HERRIN.

A mere omission of the Judge to charge the jury on a particular point, where no specific instructions on it have been asked, is not error.

An interval of *twelve months or thereabouts* in the actual occupation of land, is fatal to a title, based upon an adverse possession of seven years, under color of title.

THIS was an action of EJECTMENT, tried before his Honor, Judge CALDWELL, at the Special Term (December, 1856,) of Stanly Superior Court.

On the trial below, the lessors of the plaintiff showed title to the land in dispute, by a grant from the State, and by mesne conveyances to them.

The defendant relied on a grant from the State to himself, and one William Crayton, of junior date, and a possession, under it, of seven years. It was proved that in 1844, the year after the defendant's grant was issued, a cabin had been erect-

ed on the premises, which was occupied by Crayton, as a dwelling, from some time in that year, up to the year 1847, or 1848, when he moved from it, with his family, and lived elsewhere "for twelve months or thereabouts;" that no person succeeded him in that occupation, and when he returned to it, at the end of that period, he found it vacant. Crayton then resumed and continued his occupation until 1851, at which time this suit was brought. One *Conrad Crayton* testified that during the year, while William Crayton was absent from the land, "he frequently saw persons working for gold on it; that he saw the branch muddy as though used for mining purposes, but could not say that the operations were continuous."

The Court, in general terms, stated the evidence to the jury, but did not, in express terms, call their attention to the testimony of Conrad Crayton. For this defendant excepted.

The Court expressed an opinion that the interval of *twelve months or thereabouts* was fatal to the defendant's title. For which the defendant further excepted.

Verdict and judgment for the plaintiff. Appeal.

Bryan, *Moore* and *Dargan*, for plaintiff.
No counsel for defendant.

Battle, J. The first question raised by the defendant in his bill of exceptions, has been too often decided by this Court to be now open for argument. A mere omission by the Judge to charge the jury upon a particular point, where no specific instructions upon it have been asked, is not error. *Torrence* v. *Graham*, 1 Dev. and Bat. Rep. 288; *State* v. *O'Neal*, 7 Ire. Rep. 253; *Arey* v. *Stephenson*, 12 Ire. Rep. 34.

The second exception is equally untenable. The interval of "twelve months or thereabouts" in the actual occupation of the land by William Crayton, was fatal to the defendant's claim of title upon an adverse possession of seven years under color of title. *Holdfast* v. *Shepherd*, 6 Ire. Rep. 361. In this respect, a claim by means of an adverse possession under

the statute of limitations, differs essentially from one by means of a possession, raising the presumption of a grant. *Reed* v. *Earnhart*, 10 Ire. Rep. 516; *Taylor* v. *Gooch*, 3 Jones' Rep. 467.

Nor can the testimony of Conrad Crayton help the defendant. The operations of the gold-hunters, spoken of by this witness, on the land, during William Crayton's absence, were not such as to constitute an adverse possession under the statute. The witness could not say they were continuous, and they had quite as much the appearance of distinct trespasses, as of an actual occupation of the land under a claim of title. This Court has decided, after a review of all the cases on the subject, that the cutting of trees and the feeding of hogs upon a tract of land susceptible of other uses and enjoyment, under a color of title for seven years, did not constitute such a possession as would bar an entry. *Loftin* v. *Cobb*, 1 Jones' Rep. 406.

The acts of the gold-hunters, as proven in this case, ought not to have any greater efficacy.

There is no error, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

H. M. SHAW *et al. propounders vs.* JOHN A. MOORE *et al. caveators.*

One who believes in the existence of a SUPREME BEING, and that God will punish in this world for every sin committed, though he does not believe that punishment will be inflicted in the world to come, is a competent witness.

ISSUE of *devisavit vel non*, tried before his Honor, Judge BAILEY, at the Fall Term, 1856, of Currituck Superior Court.

A script, as the last will and testament of Alfred Perkins, was offered for probate. It had two subscribing witnesses, one of whom was admitted by the caveators to be competent; the other was objected to on account of his religious belief.

He professed "to believe in the obligation of an oath on the Bible; in God and Jesus Christ, and that God would punish in this world all violators of his law; that the sinner would be inevitably punished in this world for each and every sin committed, but that there would be no punishment after death, and that in another world all would be happy and equal to the angels."

His Honor held the witness to be competent; for which the caveators excepted.

Verdict and judgment for the propounders. Appeal by the caveators.

Heath, for the propounders.
Smith and *Pool*, for the caveators.

Pearson, J. The case presents this question: Is a person who "believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in *this world*, all violators of his law, and that the sinner will inevitably be punished *in this world* for each and every sin committed; but there will be no punishment *after death*, and that in another world all will be happy and equal to the angels"—a competent witness?

The law requires two guaranties of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. In reference to the first, no question is made; but it is insisted, that the religious sanction required, is the fear of punishment in a *future* state of existence.

This position is not sustained by the reason of the thing, for, if we divest ourselves of the prejudice growing out of preconceived opinions as to what we suppose to be the true teaching of the Bible, it is clear that, in reference to a religious sanction, there is no ground for making a distinction between the fear of punishment by the Supreme Being in this world, and

the fear of punishment in the world to come; both are based upon the sense of religion. If, on the one hand, it be said, that there is, in the fear of punishment in a future state of existence, an awful, undefined dread, and on the other, that from the constitution of our nature, we fear more that punishment which is near at hand, than that which is distant, the reply is, this is matter of speculation merely, and has no bearing upon the question, because the efficacy of the fear of punishment in either case, depends upon the degree of the belief as to the certainty of that punishment; so that, there can be, upon reason, no ground for making a distinction. The rule of law which requires a religious sanction, is satisfied in either case.

It is true, that in the old cases it is held to be the common law, that no infidel, (in which class Jews were included,) could be sworn as a witness in the courts of England, which was a *Christian* country; and Lord Coke gives this as his opinion, in which he says all the cases agree, and he assigns as the reason on which the law is based, "All infidels are in law *perpetui inimici;* for, between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility." This reason, to say the least of it, is narrow-minded, illiberal, bigotted and unsound.

One excellence of the common law is, that it *works itself pure*, by drawing from the fountain of reason, so that if errors creep into it, upon reasons, which more enlarged views and a higher state of enlightenment, growing out of the extension of commerce and other causes, proves to be fallacious, they may be worked out by subsequent decisions. Accordingly, it is laid down by Lord Hale, notwithstanding the opinion of Coke and the old cases, to be the common law, that a Jew is a competent witness, and may be sworn on the old Testament, and such has ever since been taken to be the law. Afterwards, in the case of *Omychund* v. *Barker*, 1 Atk. 19, and also in Willes' Report, 538, it was decided by the Lord Chancellor, with the assistance of Chief Baron Parker, Chief Justice Willes and Chief Justice Lee, that a Gentoo, who was an infidel, who did not believe in either the Old or New Tes-

tament, but "who believed in a God, as the Creator of the Universe, and that he is a *rewarder of those who do well*, and an *avenger of those who do ill*," is, according to the common law, a competent witness, and may be sworn in that form which is the most sacred and obligatory upon his religious sense. The case does not show whether, according to the Gentoo religion, rewards and punishments are to be in this world or in the world to come. The decision was made without ascertaining how the fact was; so, it must have been considered by the Court to be immaterial; no reference is made to any distinction in regard to the *time* of punishment by any of the counsel in the long and full arguments made on both sides; nor is there any intimation or allusion to such a distinction in the opinions of Chief Baron PARKER, Chief Justice LEE and the Lord Chancellor. The only thing, throughout the whole case, which suggests to the mind the existence of such a distinction, is an expression ascribed to Chief Justice WILLES, by Atkins in his report of this case, viz., "I am clearly of opinion, that if they (infidels) do not believe in a God, or future rewards and punishments, they ought not to be admitted as witnesses." This expression is inconsistent with the decision of the case in which Willes and the others all fully concurred, for, there was no allegation or proof that the witness believed in *future* rewards and punishments; so there must be a mistake. The Chief Justice either used the word "*future*" inadvertently, and without, in his own mind, attaching any force to it, or Atkins misconceived his meaning; and yet this expression is referred to by most of the English writers who treat of evidence, and is the foundation of all the error on this subject. Some fifty years after the case was reported by Atkins, the opinion of Chief Justice WILLES, drawn out at length, in his own hand-writing, was found among his manuscripts, and is reported in Willes. The words in this manuscript are: "I am clearly of opinion, that such infidels, (if such there be,) who either do not believe in a God, or if they do, do not think that he will reward or punish them *in this world or in the next*, cannot be witnesses in any case, or un-

der any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them." This proves either that Atkins misapprehended the words of the Chief Justice, or that, upon reflection, he thought proper to alter the expression, so as to make it consistent wfth the decision.

The great case of *Omychund* v. *Barker*, (it may well be called "great," for it relieved the common law from an error, that was a reproach to it,) establishes the rule to be, that an infidel is a competent witness, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the *time* of punishment. The substance of the thing is, every *oath must have a religious sanction.* Such being the common law in regard to infidels, it follows, *a fortiori*, that the same rule is applicable to a witness, who is a *Christian;* and the fact, that this Christian believes that the divine punishment will be inflicted in this world, and not in the world to come is immaterial, and in no wise affects the principle of the rule. It is a mere "difference of opinion," as to the true teaching of the gospel. This we find is the conclusion of the Courts in most, if not all, of the States of the Union where the question has been presented for adjudication. 15 Massachusetts Rep. 177; 2 Cushing 104; 18 Johnson 98; 5 Mason 18; 2 Alabama 354; South Carolina Law Journal 202; 13 Vermont 362.

It was insisted, in the argument, that although this may have been the rule of the common law, it is changed by our statutory provisions prescribing the forms of oaths, ch. 76 Rev. Code.

We think it manifest, by a perusal of the Statute, that it was not intended to alter any rule of law, but the sole object was to prescribe forms, adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity. Accordingly, the first section prescribes a form of oath as a general form, suited to such as hold the ordinary tenets of the Christian religion; that is, an oath, laying the hand upon "the Holy Evangelists," &c. The second section

makes an exception in favor of those Christians who have conscientious scruples against taking an oath on the Holy Evangelists, and the form of oath is framed in reference to their belief, as to a "great day of judgment, when the secrets of all hearts shall be known." The third section makes an exception in favor of those Christians who are Quakers, &c., and the form is framed in reference to their peculiar belief, "swear not." This satisfies the words of the Statute, and the argument that it was also intended to change the law by prohibiting any one from being sworn except in one or other of the prescribed forms, proves too much; for, it would exclude both Jews, and infidels who believe in a God. We think it indecent to suppose that the Legislature intended in an indirect and covert manner to alter a well-settled and unquestioned rule of law, and, in despite of the progress of the age, to throw the country back upon the illiberal and intolerant rule which was supposed to be the law in the time of bigotry; for, it was every day's practice to swear Jews upon the Old Testament, and *Omychund* v. *Barker* had settled the rule that infidels are to be sworn according to the form which they hold to be most sacred and obligatory on their consciences.

If it be admitted, for the sake of the argument, that, besides prescribing forms for general use, the Legislature had the purpose of altering the common law, so as to exclude Jews and infidels, who believe in a God, and Christians, who do not believe in future rewards and punishments, from the *privilege* of taking the oaths which are required to enable them to testify as witnesses, or to take any office or place of trust or profit, in other words, to degrade and persecute them for "opinion's sake," then it is clear, that the statute, so far as this purpose is involved, is void and of no effect, because it is in direct contravention of the 19 sec. of the Declaration of Rights: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."

We go further, and express the opinion, that if *Omychund* v. *Barker* had not relieved the common law from the reproach

of holding Jews and infidels, who believe in a God, unfit to take an oath, treating them as "servants of the devils," because their belief differs from ours in regard to the attributes of the Being who created and governs the Universe, or if any part of that reproach was still left, the effect of this section of our declaration of rights, would be, to extirpate the error and tear it up by the roots.

It was said in the argument, "to be sworn as a witness is *no privilege*—the person loses nothing by being incompetent." This is a narrow view of the question. If he be held incompetent as a witness on the ground that he cannot take an oath, it follows that he cannot swear to a book account. If an injunction is obtained, it must be made perpetual, because he cannot swear to his answer; nay, more, he cannot take the oath of office as a constable, sheriff, justice of the peace, judge, legislator or governor; in short, it would be the institution of a "test oath," towards which our revolutionary fathers had so just an abhorrence, and which is wholly repugnant to the tolerant and enlightened spirit of our institutions and of the age in which we live. There is no error.

PER CURIAM. Judgment affirmed.

JOSEPH J. WILLIAMS AND WIFE *vs.* JOSHUA GRIFFIN *et al.*

The fact of the registration of a deed, without its having been proven, will not entitle it to be read in evidence.

ACTION of TRESPASS q. c. f., tried before his Honor, Judge MANLY, at the Fall Term, 1856, of Beaufort Superior Court.

On the trial, a deed to Thomas Collins and Christian Reed, from Samuel and Thomas Gardner, was offered in evidence in behalf of the plaintiffs. It did not appear that this deed had ever been proved; there was an endorsement upon it of registration, but no endorsement or other evidence of its hav-

ing ever been proved. It was objected to as evidence for the want of probate, and excluded by his Honor. For which the plaintiffs excepted.

Plaintiff took a nonsuit, and appealed.

No counsel appeared for the plaintiff in this Court.
Rodman, for defendant.

Nash, C. J. The question presented in this case is scarcely an open one. The general provision made by the Act requiring deeds for lands to be registered, is that "no conveyance of land shall be valid unless it be acknowledged by the grantor, or proven upon oath before one of the Judges of the Supreme Court, or of the Superior Court, or in the County Court of the County where the land lieth, and registered by the public register of the County." Until a deed is proved, as by the Act directed, the public register has no authority to put it on his book; the probate is his warrant, and his only warrant for so doing. *Burnett* v. *Thompson*, 3 Jones' Rep. 113; *Tooley* v. *Lucas*, Ibid. 146; *Lambert* v. *Lambert*, 11 Ire. Rep. 162.

In this case the original deed was produced, upon which is a certificate of registration. The case states, however, that there was no evidence that it ever had been proved. If, upon this certificate of the register, the deed is to be received in evidence, the Act requiring probate is a dead letter, and the unauthorised act of the register gives efficacy to the deed as evidence. The case of *Freeman* v. *Hatley*, 3 Jones' Rep. 115, affirms this view of the question. The evidence there was admitted upon the peculiar circumstances of the case; the original deed was lost, and the records of the County Court of Montgomery, the County in which the land lay, were destroyed by fire. There is no error.

Per Curiam. Judgment affirmed.

EDWARD BRANNOCK *vs.* HENRY BUSHINELL.

Where an action of debt is brought on a simple contract, no subsequent promise, however explicit, is sufficient to take it out of the statute of limitations.

ACTION OF DEBT, tried before his Honor, Judge PERSON, at the Fall Term, 1856, of Caswell Superior Court.

The action was upon an unsealed note, dated 20th March, 1844, due one day after date. The writ was issued on the 6th of October, 1853. The defendant pleaded the statute of limitations; to which plaintiff replied that, within the three years preceding the issuing of the writ, the defendant promised to pay the said note.

There was evidence tending to establish the plaintiff's replication; but as the case turned upon the form of action, it is not deemed necessary to state it.

It was agreed by the counsel in the Court below, that the jury should give their verdict for the plaintiff, subject to the opinion of the Court upon the question of law, whether the evidence was sufficient to take the case out of the operation of the statute of limitations, and that, in case he should be of opinion with the plaintiff, he should recover the amount found by the verdict, but, if of a contrary opinion, a judgment of non-suit should be entered.

The Court, being of opinion with the plaintiff, gave judgment accordingly; from which the defendant appealed.

Morehead, for plaintiff.
Hill and *Bailey*, for defendant.

BATTLE, J. An objection founded upon a reason which was not adverted to in the Court below, but which is insisted on in the argument here, is fatal to the plaintiff's claim, at least in its present form. The action is debt, upon a promissory note, and as such, no promise, however explicit, is sufficient to take it out of the operation of the statute of limitations.

The case of *Morrison* v. *Morrison*, 3 Dev. Rep. 402, which was an action of debt upon an unsealed engagement of the defendant's intestate, to convey to the plaintiff a tract of land, is directly in point. That case was based upon the English one of *A'Court* v. *Cross*, 11 Eng. Com. L. Rep. 124; and the principle has been recently recognised again in this Court. See *Thompson* v. *Gilreath*, 3 Jones' Rep. 493. The principle is, that the action of debt, being founded on the original contract, is barred by the statute, and then the replication that the defendant promised to pay within three years next before suing out the writ, is a departure in pleading, and, therefore, inadmissible, and of course no testimony can be allowed to support it. As the verdict was taken in the Court below, subject to the opinion of the presiding Judge, whether the evidence was sufficient in law to take the case out of the operation of the statute of limitations, and as we are of opinion that it was not, though for a reason not in the contemplation of the parties, we must reverse the judgment rendered for the plaintiff, and direct a judgment of non-suit to be entered here. It is not a proper case for allowing the amendment asked for by the plaintiff's counsel. *Grist* v. *Hodges*, 3 Dev. Rep. 204; *State* v. *Muse*, 4 Dev. and Bat. 322. Let the judgment be reversed and a judgment of nonsuit entered.

PER CURIAM. Judgment reversed.

MATTHEW SMITH vs. JOHN EASON, ADM'R.

In ascertaining whether an instrument was intended by the maker to operate as a *bond* or as a *will*, words which may not change the legal effect of the instrument, and may, therefore, be immaterial in construing it, supposing its character to have been established, may be quite material in ascertaining its character, and though their alteration or erasure may be of no importance in the former point of view, yet they are quite material in the latter.

ACTION OF COVENANT, tried before MANLY, J., at the Fall Term, 1856, of Wayne Superior Court.

The action was brought upon the following instrument of writing:

"I, Henry Britt, Sen., do this day give my note to Matthew Smith, in the manner following, for my executor or *administrator* to pay to Matthew Smith, five thousand dollars, just for the good will I have for him, at my death, for him to have in fee simple forever, as *witness my hand and seal*, this Feb. 18, 1854. HENRY BRITT, Sen., [*Seal.*]

Test—William T. Hines."

The subscribing witness testified that the instrument was written by the plaintiff, after the dictation of the intestate; that it was read word for word as it was dictated, and that it was read to him more than once. This witness also testified that the instrument was all written at the same time and with the same ink, and that it was, at the time of the trial below, in the same condition as it was when executed.

Witnesses were called on the part of the defendant, who stated that, with the assistance of a glass, they could perceive there was a part of the writing done with different ink, that is, the dotting of an "i" or the crossing of a "t"; the word "administrator" was interlined, and the words "witness my hand and seal" were interlined also. These witnesses also stated that the word "executor" and the signature of the obligor were in a different ink.

The defendant contended—

1st. That this instrument was a will, and could be of no legal effect until after probate and registration, and that this was a question of law.

2nd. Supposing the instrument to have been executed, that it had been altered since its execution in the several particulars stated by the witnesses, and was, on that account, void.

The Court instructed the jury as to the first point, that it involved a question of fact, depending not only upon the phraseology of the instrument, but also upon the intention of the maker, as it might be gathered from the testimony of the sub-

scribing witness and circumstances. And they were directed to enquire from the facts whether it was intended to operate between the parties, upon its delivery, as a clear irrevocable act—as a note or bond which the maker could not abrogate, or as a will; if the former, it was good; if the latter, it was not good, for the want of attestation, probate, &c. For this, the defendant's counsel excepted.

With respect to the alterations alleged, the Court was of opinion that, by whomsoever or wheresoever made, they did not *per se* avoid the instrument; that the crossing of a "t" or dotting an "i," putting in "administator" and "witness my hand and seal," were immaterial alterations, and did not change the legal effect of the instrument; but that, unexplained, they were matters of suspicion, and might be considered in connexion with objections to its original execution, or to its fairness in other respects; that the law on this point had been diversely held, but that he believed this opinion in accordance with the weight of authority.

Defendant further excepted.

Verdict and judgment for plaintiff, and appeal by defendant.

Moore, for plaintiff, (with whom were *Dortch* and *Bryan*,) argued as follows:

1. The rule of law respecting the alteration of bonds as stated in Pigot's case, is not followed any where. No text writer states it with the rigour of Lord Coke. See 2 Bl. Com. 308; Chit. Genl. Pr. 304. The rule is not followed in England. *Adams* v. *Bateson*, 19 E. C. L. Rep. 21; *Hudson* v. *Revett*, 15 Ibid. 472; Best's opinion; *Collins* v. *Prosser*, 8 E. C. L. Rep. 183.

2. The opinion of the Court in *Pullen* v. *Shaw*, 3 Dev. 238, that an immaterial alteration made by the obligee will avoid the bond, is extrajudicial.—In *Nunnery* v. *Cotten*, 1 Hawks 222, the doctrine is pushed to an extreme. Even in this case, however, the Court ground their opinion, that the alteration

was done with "a fraudulent design," per TAYLOR, C. J. The Court assume that the act done is a "serious offense," that is, forgery. There can be no forgery unless the alteration is material.—The doctrine in Pigot's case is disaffirmed in *Matthis* v. *Matthis*, 3 Dev. and Bat. 60; *Blackwell* v. *Lane*, 4 Dev. and Bat. 113. In neither of these cases is any notice taken of *Pullen* v. *Shaw* or *Nunnery* v. *Cotten*. It is submitted that this silence is significant of dissatisfaction with the broad doctrine laid down in them; especially when we observe the Court citing in *Matthis* v. *Matthis*, Chit. Gen. Pr. 304.

3. There is no question, perhaps, on which such abundance of respectable contradictory authority may be cited; and for the ease of the Court in investigating the subject, they are referred to *Smith* v. *Croker*, 5 Mass. 539; *Hunt* v. *Adams* 6 Ibid. 519; *Davidson* v. *Cooper*, 11 Mees. and Welsb. 778; Chitty on Cont. 785–6, and notes and cases cited; *Waugh* v. *Bussell*, 1 E. C. L. Rep. 241; *Hatch* v. *Hatch*, 9 Mass. 307. The doctrine that an immaterial alteration made by a stranger, will *not* vitiate a bond, is founded in correct principles of pleading. *Waugh* v. *Bussell* ut supra. And that it will vitiate, if made by the obligee, is a departure from those principles, for the declaration is the same in both cases. If it be necessary only to set out the substance of the bond, upon what principle is it that words added by one, will destroy, which added by another will be harmless? The distinction can be founded only on the idea of punishment; and this is a perfect anomaly in the law. If the purpose be to guard the instrument from all vice, it ought to be void by whomsoever the alteration is made. It is moreover absurd to apply the doctrine to a covenant to pay money and pretermit it in a covenant to stand seized of a use. *Fulmouth* v. *Roberts*, 9 Mees. and Welsb. 469.

The true and sensible doctrine is, that the bond becomes void when it is a forgery. This is ample protection.

W. A. Wright and *Husted*, for defendant.

Pearson, J. Admitting that there is no error in respect to the first point, and that whether an instrument be a bond or a will, depends upon the intention of the maker, which is to be ascertained as well "from the testimony of the subscribing witness and other circumstances" as from "the phraseology of the instrument," it is very certain that its contents have an important bearing upon the question; in fact, the words used in it are, in most cases, decisive of the character of an instrument.

We think there is an error in respect to the second point. His Honor was of opinion that the alterations, by *whomsoever* or *wheresoever* made, did not avoid the instrument, because they did not change its *legal effect*, and consequently were immaterial.

From this general language, the appellant has a right to assume that the alterations were made by the *plaintiff after the instrument was executed*, and in that view, we are now to consider the question. This renders all the learning in reference to alterations in materia land immaterial parts, made by a *stranger*, inapplicable. For the sake of avoiding a vexed question, discussed in *Nunnery* v. *Cotten*, 1 Hawks' Rep. 222, *Pullen* v. *Shaw*, 3 Dev. 238, *Matthis* v. *Matthis*, 3 Dev. and Bat. 60, "Pigot's case" and the numerous other cases cited, we will admit, that an alteration of a *bond* made by the obligee in an immaterial part, does not avoid the bond, and that any alteration is immaterial which does not change its legal effect; for instance, if an instrument is, *without question*, a bond, i. e., "One day after date, I promise to pay A B $500, for the payment of which sum, I bind myself and my executors for value received," (sealed and delivered,) the addition of "administrators" after executors, or interlining "witness my hand and seal," although made by A B, does not alter its legal effect, and, according to our admission, does not avoid the bond.

But it must be borne in mind, that this admission is made upon the supposition, that the character of the instrument as a bond is fixed. In our case, the character of the instrument

is the very question in dispute, and his Honor was led into error by assuming, in the first part of his charge, that the character of the instrument was fixed, without reference to the alterations, and afterwards, in the second part of the charge, treating it as a bond, under the misapprehension that the question then was, whether the alterations changed its legal effect. The instruction prayed for, in the second place, was, that the alterations avoided the instrument, supposing it to have been executed, leaving its character undetermined. Now, although the alterations were immaterial in reference to the legal effect of the instrument, supposing it to be a bond, yet they were clearly very material in reference to its *character*, that is, whether it be a bond or a testamentary disposition, for this, as we have seen, was to be decided mainly by the words contained in it; and it may well be, that a word will change its *character*, although, supposing that to be fixed, the same word would not change its legal effect; for instance, if one make an instrument, in writing, for his *executor* to pay A B $5,000, the addition of the word "administrator" tends to fix its character as a bond, and to repel the idea of its being a direction to his executor as a testamentary disposition, by providing for a case of intestacy; so, the words "witness my hand and seal," have a tendency to give to it more of the appearance of a bond, and consequently to influence the decision of the question as to its character. In this view of our case, the alterations were material. It is admitted that the alteration of a bond by the obligee in a material part, so as to change its legal effect, avoids it. This is upon the ground, that it is a wilful and fraudulent attempt to change its nature, and amounts to a "spoliation." The same principle applies to an alteration of an instrument, by the party interested under it, in a material part, so as to change its character; upon the ground, that it is a wilful and fraudulent attempt to change its nature, and amounts to "spoliation." In like manner, expunging a word, if the character of the instrument be undisputed, may not change its legal effect, whereas, if the question be as to its character, such expunging may change it

altogether, and would consequently be a material alteration. For instance, "I give and bequeath to A B my sorrel horse," (signed, sealed and delivered). This is a testamentary instrument. Expunge the word *bequeath*, and it becomes a deed of gift.

The case does not state distinctly that the instrument in question was delivered. This circumstance would tend strongly to fix its character; for delivery is necessary to make a deed, and, although not wholly inconsistent with the making of a will or a testamentary disposition, is very rarely a part of the *res gestæ* at its execution.

PER CURIAM. *Venire de novo.*

WILLIAM BARRETT *vs.* R. A. COLE *et al.*

Property delivered as a pledge to secure a debt, and re-delivered by the pawnee to the pawnor, is liable to be seized and sold under execution against the pawnor.

TROVER, tried before SAUNDERS, Judge, at a Special Term (November Term, 1856,) of Moore Superior Court.

The suit was brought for the alleged conversion of a horse. One Due, being indebted to the plaintiff, delivered him the horse in question, as security for a debt which he owed him, and immediately the horse was delivered back to Due, upon an agreement, that it was to be kept and used by him until the ensuing fall, when plaintiff was to sell it, and out of the proceeds pay his debt, and the excess, if any, was to be returned to Due.

The horse in question was seized by the defendant Cole, who was a constable, duly qualified, and sold under a process, at the instance of the defendant Tyson, who was the plaintiff in the execution, and who became the purchaser of the pro-

perty and made use of it. The plaintiff was present at this sale and forbade it.

The debt under which the property in question was seized, was due prior to the contract between Due and the plaintiff, and the debtor was entirely insolvent.

Upon the trial below, the jury returned a verdict for the plaintiff by the consent of counsel, with an understanding, that if his Honor was of opinion that the plaintiff was entitled to recover on the facts above stated, a judgment was to be entered accordingly, but if of a different opinion, the verdict was to be set aside and a nonsuit entered.

His Honor, on considering the question reserved, gave judgment for the plaintiff, from which the defendants appealed.

No counsel appeared for the plaintiff in this Court.
Kelly and *Haughton*, for the defendants.

Battle, J. The contract between Due and the plaintiff, by which the horse in question was delivered to the latter, for the purpose of securing a debt which Due owed him, was undoubtedly intended by the parties as a security for money, and must have been either a mortgage or a pledge. If it were a mortgage, it was clearly void as against creditors, because not in writing, and proved and registered within six months as required by law. Rev. Stat. ch. 37, sec. 23; (Rev. Code ch. 37, sec. 22). If it were a pawn or pledge, we think that it was equally void as against the creditors, because the possession, instead of being retained by the pawnee, was immediately restored to the pawnor. A pawn is defined to be a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt is discharged. It is the *pignori acceptum* of the civil law, according to which, the possession of the pledge (*pignus*) passed to the creditor, therein differing from the *hypotheca* where it did not. See Kent's Com. 577, and the authorities there referred to. In the well-considered case of *Doak* v. *the Bank of the State*, 6 Ire. Rep. at page 319, Daniel, J., says, "a pledge is a deposit of personal effects, not to

be taken back but on payment of a certain sum, by express stipulation to be a lien upon it." Nash, Judge, says of the pledge that it is essential, "that the possession of the article should accompany it;" Ruffin, Chief Justice, who filed a dissenting opinion, does not deny that the possession of the article must accompany the pledge, but contends that, being but a security for money, it ought to be in writing and made public by probate and registration, like mortgages and deeds in trust, otherwise it should be void as against creditors. Bank, and other stock, and choses in action, he admits to be an exception, because they cannot be rendered liable to the satisfaction of a judgment, either upon execution, or by a decree of the Court of Equity. See his opinion at page 335. The mischiefs which the Chief Justice strongly depicts as likely to arise from holding that a pledge of a personal chattel, where the possession accompanies it, need not be in writing, and proved and registered, would be greater if the pawnor were at liberty to take back the pawn and keep it for a longer or shorter time, under another agreement with the pawnee. Being the original owner, his possession would be less likely to lead to a knowledge of the circumstances under which he held it. How could a creditor or purchaser know —what reason would he have, even to suspect, that he had pledged it for a debt, while he still continued to possess and use it as formerly? This very case, if the judgment were affirmed, would afford a striking example of the injustice and hardship of the rule. The defendant Tyson was a creditor of Due at the time when he pledged his horse to the plaintiff. Due immediately took back the horse, and was in possession of it at the time when the defendant levied the execution upon it at the instance of Tyson. Here was the owner in possession of his own horse, and yet the defendant Tyson is to lose his debt, and have to pay, besides, a heavy bill of costs, because, forsooth, Due had made a secret pledge of the horse to another person! We call the pledge a secret one, because it was not in writing and put upon the register's book, and there is no testimony to show that the defendant knew any

thing about it. Such ought not to be, and we believe is not, the law. The judgment must be reversed, and, according to the agreement of the parties, a judgment of nonsuit must be entered here.

PER CURIAM. Judgment reversed.

STEPHEN SMITH *vs.* HENRY SASSER.

Property delivered as a pledge, to secure a debt, and re-delivered by the pawnee to the pawnor, may be *sold* by the latter, and a good title passes.

ACTION of TROVER, tried before SAUNDERS, Judge, at a Special Term (December, 1856) of Wayne Superior Court.

The declaration alleged the conversion of a gun.

One Bright Kennedy was the owner of the gun in question, and having had some repairing done to it, and being unable to pay for it, the defendant went with him to the gunsmith and advanced the money so due him. The gun, thereupon, was, in the presence of Kennedy, delivered to the defendant, upon an agreement that it was to be his property until the money was re-imbursed to him. The gun was then handed back to Kennedy, who kept it for about five months, when he exchanged it with the plaintiff for another gun. The defendant afterwards got possession of the property and converted it.

The Court charged the jury, that the property in the gun was in the defendant as a pledge, and unless they were satisfied that Kennedy had paid him the amount for which it was pledged, he was entitled to their verdict. Plaintiff excepted.

Verdict and judgment for the defendant, and appeal by the plaintiff.

Dortch, for plaintiff.
W. A. Wright, for defendant.

BATTLE, J. The principle which must govern this case, is the same as that of *Barrett* v. *Cole*, decided at the present term, (ante 40). The owner of the gun in question, pawned it to the defendant, to secure a debt which he owed him, and the defendant immediately handed it back to him, and he kept it five months, and exchanged it to the plaintiff for another gun. By giving up the possession, the defendant lost his lien, and the plaintiff acquired a good title by his purchase from the owner. Thus, it is said in STORY on Bailments, sec. 299, "that as possession is necessary to complete a title by pledge, so by the common law, the positive loss, or delivery back of the possession of the thing, with the consent of the pledgee, terminates his title." So, in 2nd Kent's Commentaries, 581, we find it laid down, that in the case of *Castilyon* v. *Lansing*, 2 Caine's cases in Error, 200, it was shown, by a careful examination of the old authorities, to have been the ancient and settled English law, that delivery was essential to a pledge, and that the general property did not pass as in the case of a mortgage, but remained with the pawnor. The pledge of moveables without delivery is void as against subsequent *bona fide* purchasers, and generally, as against creditors."

We are aware that there is an expression in the opinion, delivered by the Court, in the case of *Macomber* v. *Parker*, 14 Pick. Rep. 509, which would seem to qualify the doctrine as laid down by these eminent jurists. The expression is this: "If the vendor or the pledgor should have the actual possession of the property, after it were pledged or sold, it would be only *primâ facie*, but not conclusive, evidence of fraud. The matter might be explained and proved to be for the vendee or pledgee." Here it is not said that the possession of the pledgor is obtained by a re-delivery from the pawnee, and we presume, that such a case was not intended, because in a subsequent part of the same opinion, it is stated "that the lien would be destroyed, if the party gives up his right to the possession of the goods." Such, we believe, is the true doctrine, so far as creditors and subsequent *bona fide* purchasers are concerned. If it were otherwise, a wide door would be open

to fraud and injustice. As between the parties themselves, the rule may be different, and Story on Bailments, sec. 299, cites *Roberts* v. *Wyatt*, 2 Taun. 208, for the position, "that if the thing is delivered back to the owner, for a temporary purpose only, and it is agreed to be re-delivered to him, the pledgee may recover it against the owner, if he refuse to restore it, after the purchase is fulfilled." However this may be, it does not apply to the case before us, in which the plaintiff claims as a *bona fide* purchaser without notice. The judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

JOHN A. PHILLIPS *vs.* PATRICK MURPHY, ADM'R.

A deed conveying one's *active services for five years*, passes no property in the person making it, but gives a *chose in action*, and is not against the policy of the law.

ACTION of DEBT, tried before PERSON, Judge, at a Special Term (June, 1856,) of Cumberland Superior Court.

The plaintiff declared on a bond, of which the following is a copy:

"Six months after date, we, or either of us, promise to pay Charles D. Nixon, administrator of Louis A. Nixon, or order, the sum of one hundred and twenty-five dollars for value received, in hire of a certain negro, Robert Mills, for the term of four years, or so long as Louis A. Nixon was entitled to the services of the said negro." (Sealed and delivered.)

The due execution and delivery of the bond and its assignment to the plaintiff, were admitted. The negro, Mills, by an instrument of writing, under seal, had entered into a covenant with Louis A. Nixon, as follows:

"Know all men by these presents, that I, Robert Mills, for and in consideration of sixty dollars, to me in hand paid,

at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have given, granted, bargained and sold, and by these presents do give, grant, bargain and sell unto Louis A. Nixon, his executors and assigns, my active services, as a servant, for the full and entire term of five years, and the full and entire control of my person and labor during that entire time." (Sealed and delivered.)

After the execution of the latter instrument, Mills was, against his consent, put into the possession of the intestate. Barksdale, by the plaintiff, as administrator of Louis Nixon, and the bond, declared on, taken as the consideration of such transfer of the said Mills.

It was contended by the defendant, that this bond was void as being against the policy of the law. It was further contended, that the covenant, conveying his services, was void, and gave the covenantee no right to the services of Mills, as no man could sell himself into a state of slavery; and that the consideration expressed in the face of the bond sued on, was, therefore, void.

The foregoing facts being submitted to his Honor, as a case agreed, he gave judgment for the plaintiff, and the defendant appealed.

C. G. Wright, for the plaintiff.
Shepherd, for the defendant.

Pearson, J. There is nothing in the transaction against the policy of the law. The legal effect of the deed executed by Mills to Nixon, was not to make a slave of Mills, or in any way vest in Nixon a title to him as *property*, but simply to give Nixon a right to his service for five years, upon an executory agreement, for a breach whereof an action of covenant would lie. The fact, that Mills is a free negro, makes no difference, for a white man may bind himself in the same manner. Indeed, it is common in some portions of the State, for white men to hire themselves during *crop time*, or for a year. The peculiarity about this contract is, that it is for five years,

and is extended, by express words, to the assigns of Nixon. In fact, it is clear from the language used, that the parties supposed that Nixon acquired, under the deed, some right *more tangible* than a *chose in action* against a free negro! This supposition, however, does not alter the legal effect of the deed.

The other ground, as to a failure of consideration, was properly abandoned. At law, deeds do not require a consideration, except such as operate under the statute of uses, and a failure of consideration is not noticed, although in some cases relief is given in Equity. We do not intend to intimate that this is one of those cases. There is no error.

PER CURIAM. Judgment affirmed.

WILLIAM THOMPSON *vs.* WILLIAM WHITMAN *et al.*

Where a bond was given in lieu of, and for an indemnity against, a forged note which is surrendered, and a part of the contract is, that the individual, upon whom the forgery was made, was not to appear against the accused unless he should be summoned, such bond is against the policy of the law and void. And this, although it is expressly declared by the parties, at the time, that the new security is only given as an indemnity against the forged instrument, and not to compound the offense.

ACTION of DEBT, tried before SAUNDERS, Judge, at a Special Term (December, 1856,) of Wayne Superior Court.

The action was brought upon a bond, purporting to have been executed by William Whitman and Wright Whitman, payable to Lemuel H. Taylor, and endorsed by him to the plaintiff.

It appeared that one Gabriel Whitman was brought from the jail of Wayne county, before three magistrates, upon a question of commitment for an offense unconnected with the matter in question, and not being satisfied as to the propriety of binding him to Court, they proceeded to investigate, with-

out any warrant or other written charge, a matter imputed to him, of which they had heard, to wit, a fraud committed on Lemuel H. Taylor, by obtaining his signature on a blank piece of paper, under a false pretense, and afterwards writing a promissory note over it for four hundred dollars, payable to one Scarborough.

Upon this investigation, *Lemuel H. Taylor* testified, that Gabriel Whitman came to his house, and asked him to lend him his name, and pointing to a place on the right hand side of a blank piece of paper, desired him to sign it *there*, which he did; that afterwards a note was filled up, over the signature thus obtained, for $400, payable to Scarborough; that he obtained the note from Scarborough, in order to show it to a lawyer, by giving his receipt for the same; that afterwards, on Wright Whitman and William Whitman's giving him the bond sued on, he surrendered Scarborough's note to them; and that he expects to pay Scarborough the amount of that note. On cross examination, Taylor said, "nothing was said by Whitman as to the use he wanted with my name; I think there was something said about a token or memento, but I don't recollect distinctly."

On the same investigation, one *Micajah Martin* testified that he was at the dwelling of Lemuel H. Taylor in the January previous, and heard Gabriel Whitman say, he wanted Taylor to let him have his name on a piece of paper, because when he liked any body well, he desired to carry some token about him; that he produced the paper and pointed with his finger to the place where he wished Taylor to sign, and he accordingly did sign it in the witness' presence. The expression used by Whitman, when he requested Taylor's signature was, that he wanted to carry it about to remember him, and some such word as *memento* or *token* was also used.

It appeared in the case, that while Gabriel Whitman was in jail on the first mentioned charge, but before the examination about the note to Scarborough, a negotiation took place between Taylor and the defendants Wright and William, wherein it was agreed that Taylor should be secured and in-

demnified as to the Scarborough note; accordingly, but still before the investigation above mentioned, the bond in question was given, payable to Lemuel H. Taylor by Wright and William, who are the brothers of Gabriel Whitman, to secure and indemnify the said Taylor against the said note. The note made to Scarborough was delivered to them; at the same time it was expressly understood, that Taylor had no power to stop the prosecution, or in any manner to control it; but it was agreed and promised, on the part of Taylor, that he would not appear against Whitman, unless he was summoned so to do.

On the investigation before the magistrates, Taylor was notified to appear and give evidence, which he refused to do until he was summoned formally. Upon this being done, he did appear and testify as above stated.

The result of the investigation before the magistrates, as to the filling up of the note to Scarborough, was to commit Gabriel Whitman for trial.

Upon the trial of the case below, a verdict was taken for the plaintiff, subject to the opinion of the Court, with the understanding that if the Court should be of opinion in favor of the plaintiff, judgment should be entered on the verdict; if otherwise, a judgment of nonsuit should be entered. The Court, being of opinion with the plaintiff, gave judgment according to the verdict; from which the defendants appealed.

Dortch, for the plaintiff.
Bryan, for the defendants.

Pearson, J. The evidence left it doubtful whether Taylor had "lent his name" to Gabriel Whitman by signing it on the piece of paper, with the intention that said Gabriel might write a note above it, for the purpose of raising money, or whether Taylor had simply written his name on the paper, with the intention that the said Gabriel should keep the autograph as a *token* or *memento* of friendship. From the manner in which the verdict was entered, this fact was not passed

on, or fixed one way or the other. His Honor calls it a fraudulent note; and from the testimony of *Micajah Martin*, which is set out in the examination before the magistrate, and sent as a part of the case, and the circumstances attending the execution of the bond sued on, there was evidence tending to show that the name of Taylor was procured as a token of friendship merely, without an intention to authorise Gabriel Whitman to write a note above it; at all events, as the case is now before us, the defendants have a right to assume that state of facts.

If one writes a note above the signature of another, which happens to be at the foot of a letter, it is clearly forgery; so if he obtains the signature as an autograph, to be used as a *keep-sake*, and writes above it, it is a forgery; for forgery may be committed as well by the fraudulent application of a false instrument to a true signature, as by a fraudulent application of a false signature to a true instrument. Chitty's Crim. Law, 1038. So we have this case: Taylor, upon whom the forgery has been committed, agrees that upon his being "secured and indemnified against the payment of the money purporting to be due on the fraudulent promissory note," by execution of the bond now sued on, "he would have nothing to do with the matter, further than the law required." Upon receiving the bond sued on, he handed up the false note to Gabriel Whitman, or his agent, telling him that he could not stop the prosecution, as that was a matter in which the State was concerned, and not under his control, but that he would not appear in the prosecution unless he was summoned to do so.

We think this was *compounding* an indictable offence, and consequently, that a bond given in consideration thereof, cannot be made the ground of an action in a Court of justice. How else can an individual compound a felony or other criminal offence, except by agreeing not to prosecute, and not to tell what he knows unless he is summoned as a witness, and by giving up the false instrument, which will be most material evidence on the part of the State?

The efficacy of punishment depends more upon its certainty than its severity. Hence, it is a matter of public concern, that all violations of the criminal law should be detected and punished. So that any individual who knows that an indictable offence has been committed, and conceals it, thereby fails to discharge the duty of a good citizen. Upon this principle, the bare *concealment* of treason or felony is an indictable offence, and the offence is aggravated by *compounding* the felony—that is, by an agreement not to prosecute or make known what has come to the knowledge of the party; for, although he is the person directly injured, the law does not allow him to take care of his private interest by accepting compensation at the expense of the public justice. In offences less than felony, this concealment or compounding is not indictable, but it is, nevertheless, against the policy of the law, and the due course of justice; and the Courts would not be true to themselves if they enforced a contract founded on such a consideration. If he secures himself by an executed agreement, well; but if he relies on an executory agreement, having "cut loose" from the public, the Courts will not give aid in furtherance of his selfish attempt. This is familiar doctrine. The difficulty in the case is in making the application.

His Honor was of opinion that the consideration of the bond sued on was not against public justice. In this there is error. According to the view we take of the case, Taylor was not at liberty to take care of his private interest by accepting an indemnity, and thereby depriving the State of an *active* prosecutor; which is one of the means relied on for the conviction of offenders. The testimony of Taylor, when contrasted with that of Martin before the committing magistrates, in reference to the same transaction, suggests the fear that this *douceur* had taken effect. When the person directly interested is *appeased before the trial*, he is under strong temptations to favor the offender.

If, upon the next trial, it should turn out that, in point of fact, Taylor did sign his name with the intention that Gabriel Whitman should write a note above it, and afterwards took

advantage of Whitman's alarm by reason of the proceedings instituted by the magistrates, and induced his brothers to execute their bond for his indemnity, by giving up the note, and agreeing not to prosecute, or give evidence, unless he was summoned or required to do so, an interesting question will be presented. *Venire de novo.*

PER CURIAM. Judgment reversed.

BENJAMIN RUNYON TO THE USE OF WM. T. BRYAN *vs.* WILLIAM CLARK, *et. al.*

Where a third person pays the sum called for in a note, and takes it into his possession, it is a question of fact to be decided by a jury whether he intended to pay it off for the accommodation of the maker, or to purchase it.

ACTION of ASSUMPSIT, tried before MANLY, Judge, at the Fall Term, 1856, of Beaufort Superior Court.

The plaintiff declared on a promissory note, payable to him as Cashier, and negotiable at the Washington Branch of the Bank of Cape Fear. On the back of this note was endorsed, "I assign the within note to ————, without recourse to me. BEN. RUNYON, Cashier."

The defense was under the plea of payment. *Thomas H. Hardenburg* proved that the note in question had been discounted by the bank above named; that after it became due, it was delivered to the attorney of the bank for collection; that on a certain day afterwards, the said attorney and Wm. T. Bryan came together into the banking-house, the former bringing with him the note in question; he said that Dr. Bryan wished to take the note up, and that he had paid him his fee. This witness was then the teller of the bank, and received the amount of the note and the interest due thereon; he said he then delivered it to Dr. Bryan, with the endorsement on it, but his understanding at the time was that Dr.

Bryan intended to pay the note; that it was then the custom of the bank, whenever a note was discounted, to sign the endorsement which was printed on the blank form used by it. This was a practice not understood by the witness. The note was delivered to Dr. Bryan without any alteration and without any reference to the endorsement, and without any intention of passing the title to any one, and simply because it was considered as paid and extinguished. The witness said he had no authority to make such a sale or transfer of this or any other paper belonging to the bank.

Burton A. Shipp, the principal in the note, was examined for the plaintiff. He stated that, after the note fell due, being short of money, he requested Dr. Bryan to take it up and hold it over for awhile against him and his sureties; that he did not expect or intend that any of the parties were to be discharged; that he never paid any part of it to Dr. Bryan or any one else.

The blank endorsement had been filled up with the name of Dr. Bryan, but the name was immediately struck out.—This was after the suit was brought, but before the trial.

The Court was called on by the plaintiff's counsel to charge the jury that the legal effect of the endorsement was to pass the interest in the note to Bryan, and that it could not be contradicted by parol; but his Honor refused so to charge, and told the jury that it was a question of fact for them to decide whether Bryan intended to pay off the note for the accommodation of Shipp, or whether he intended to purchase it; and that, in deciding this question, the parol evidence given should be considered by them. Plaintiff excepted. Verdict for defendant. Judgment and appeal.

Rodman, for plaintiff.
Donnell, for defendant.

Battle, J. The alleged error of which the plaintiff complains is that his Honor refused to instruct the jury, as reques-

ted; that the transaction testified to by the witness, Hardenburg, was, in law, a purchase, and not a payment of the note in question. Had the testimony of this witness been the only evidence in the cause, we think that the plaintiff would have been entitled to the instruction which he asked. So far as that testimony goes, Dr. William T. Bryan was a stranger to the parties, and the money advanced by him would not have been, in law, a payment of the note; *Sherwood* v. *Collier*, 3 Dev. Rep. 380. But the testimony of the other witness, Shipp, who was a party principal in the note, presents the case in another aspect. According to him, Dr. Bryan went at his instance to take up the note. It is true, he says that he did not intend that the note should be discharged, but should be held up against him and his sureties. Such might have been the intention of Dr. Bryan when he went to bank for the purpose of serving his friend. If so, it is his misfortune that he did not distinctly inform the officer of the bank of it, so that there could be no doubt that he was purchasing the note, and not paying it off. Hardenburg certainly thought that he was doing the latter, and hence arises the question, what was the true nature of the transaction between them? was it a purchase or a payment? Upon that question there was evidence tending to support either side of it, but none establishing it conclusively either way. The blank endorsement, made long before, without any view to a sale of the note to Bryan, and of which he was ignorant, could not have the effect claimed for it by the plaintiff's counsel. It would, at most, be only a circumstance to be taken into consideration, together with other circumstances, to prove that a purchase of the note was intended. There were other facts and circumstances related by Mr. Hardenburg, which tended to show a payment; for if Bryan chose to advance the money for Shipp, the principal in the note, it was a payment by the latter, through him, as agent. His remedy, in that case, would be against Shipp only, for money paid at his request, and for his use. These conflicting views, presented by the testimony, his Honor was bound to submit to the jury, and

as he did so fairly, the party against whom the verdict was found has no right to complain of it.

PER CURIAM. Judgment affirmed.

STATE *vs.* ISAAC HARVELL.

The allegation of a bill of indictment, charging A and *four* others with an assault on B, is not proved by the production of a record, which sets forth a bill of indictment, charging A and *five* others with an assault on B.

INDICTMENT for PERJURY, tried before DICK, J., at the Fall Term, 1856, of Stanly Superior Court.

The bill charges that, at a certain term of Stanly Superior Court, held by Judge BAILEY, "a certain issue between the State and Conrad Crayton, John McEachen, Alexander Hunnicut, Monroe Yow, and Isaac W. Crayton, in a certain bill of indictment of an assault and battery, wherein the State was plaintiff, and Conrad Crayton, and the others, (naming the same four others,) were charged with an assault and battery upon the person of Isaac Harvell, came on to be tried," &c,, and that the perjury was committed in the trial of such issue.

The record produced to establish this former trial, sets out a trial before Judge BAILEY, at the term stated, on an indictment against six persons—that is, against Conrad Crayton and five others, for an assault and battery on Isaac Harvell. The defendant's counsel objected to this record as evidence of the allegation in the bill, on account of the variance. His Honor overruled the objection and admitted the evidence, for which the defendant's counsel excepted.

MEM. The record of the indictment and trial before Judge BAILEY was not sent to this Court, but it is described in the Judge's statement as above set out. He also speaks of it in this statement as "an indictment against Conrad Crayton and others."

The defendant was found guilty. Judgment and appeal.

The Attorney General, *Bailey*, argued as follows:

It is submitted, that a joint plea, by several defendants, in an indictment, is, in law, a joint and several plea as to each; but whether the trial shall be separate or not is a matter of sound discretion in the Court below. *State* v. *Smith*, 2 Ire. 452. And if such an order was made, it must be presumed to be right, it being the exercise of a discretion from which there is no appeal. *State* v. *Lamon*, 3 Hawks. 175, and various other cases. In the exercise of such a discretion the Superior Court exercises supreme powers. As, therefore, the Court had the power to order a separate trial in its discretion, and as such an order reconciles the apparent variance, the existence of such an order should be *presumed*, as it is a presumption of law, that as to manner and form of proceeding, Courts of original supreme criminal jurisdiction, act rightly. *Kimbrough's case*, 2 Dev. 431; *State* v. *Seaborn*, 4 Dev. 305; *State* v. *Ledford*, 6 Ire. 5. By applying this presumption to the case before the Court, it will become manifest that there was no variance; for, although six may have been originally indicted, yet the Court granted one of them a separate trial; and the indictment, therefore, alleged that the perjury was committed on the trial of the indictment against five. The two cases may have, very probably, been tried at the same time, and the jury having found the defendants guilty, the Court may have rendered judgment against all. It cannot be urged that the indictment should have stated the order for the separate trial, as it is only required by the Act of 1842, ch. 49, digested in Rev. Code, ch. 35, sec. 16, that the indictment should state the substance of the offence charged upon the defendant, without setting forth any part of any record or proceedings, and the indictment in this case is framed under that act; as, therefore, the indictment does not profess to state the whole proceedings in the first case, and as the law does not require it to be stated, it is submitted that no counter presumption

can be made from its silence in this respect; and as the Court below had the right, and might have ordered a second trial, which would cure the apparent variance, this Court should presume that the order was made; for it is not only the settled rule of this Court to affirm every judgment not seen to be erroneous, (*Thomas* v. *Alexander*, 2 Dev. and Bat. 385,) but every judgment of the Superior Courts is *presumed* to be right, unless it appears to be erroneous. *Fleming* v. *Halcombe*, 4 Ire. 268.

It is further submitted, that it does not clearly appear from the Judge's statement, as a fact, that any variance existed, as it is only stated as a reason offered by counsel; but however that fact may be, it was the exclusive province of the Judge below to decide whether the record offered in evidence was the one described in the indictment; for the question of *nul tiel record* is a question of fact, not a question of law, to be tried as such by the Judge. *State* v. *Isham*, 3 Hawks 185. The determination of a question of fact, whether tried by a judge or jury, cannot be reversed; therefore, the decision of the Judge below, as to the fact of the record, is conclusive. *State* v. *Raiford*, 2 Dev. 214. By admitting the record to be read as proving the allegation of the indictment, his Honor necessarily adjudged it to be the record recited. As this Court cannot re-examine, and consequently correct, this decision, even if erroneous, it becomes an immaterial enquiry whether the record produced did, in *fact*, agree with that recited, as this Court will not do that indirectly which they refrain from doing directly, which is the thing asked of your Honors in the first point.

Dargan, for defendant.

Pearson, J. The allegation of a bill of indictment, wherein the State was plaintiff, and Conrad Crayton and *four* others, (naming them,) were charged with an assault and battery upon the body of Isaac Harvell, is not proved by the production of a record which sets out a bill of indictment, where-

in the State is plaintiff, and Conrad Crayton and *five* others (naming them) are charged with an assault and battery upon the person of Isaac Harvell. The variance in respect to the defendants is fatal. The indictment offered in evidence does not correspond with that which is described; and, in pleading, it is a familiar rule, that although a description is made with more particularity than need be, still all the particulars must be proven, and hence the rule applicable to pleadings differs from that applicable to deeds or wills; for, in the latter, if there be several particulars of description, one which does not correspond may be rejected, provided the identity of the thing can be sufficiently made out by the others; otherwise in pleading. The reason is, that pleadings may be instituted anew; but in regard to deeds and wills, and the like, there is no chance for a second trial. *Miller* v. *Cherry*, in Equity at this term.

It was insisted by *Mr. Bailey*, that as the issue upon the plea of *nul tiel record* was tried by the Judge in the Court below, his decision of the fact was not the subject of review in this Court. Mr. Bailey failed to take the distinction between matter of law, which is involved in an issue, and matter of fact. What amounts to a variance is clearly a question of law, and is the subject of review in this Court, as well when it arises upon an issue on the plea of *nul tiel record*, when the Judge *presents it to himself and decides it*, as when it arises upon an issue on the plea of *non est factum*, when the Judge gives it in charge to the jury. Our books furnish abundant illustration, e. g., the proceedings to charge bail, ca. sa. bonds, and the like.

Mr. Bailey also insisted that the fact that the bill of indictment offered in evidence was against Conrad Crayton and five others, did not appear, except by way of inference, from what the defendant's counsel requested the Judge to decide, and his refusal.

The record of that indictment ought to have been sent as a part of the case; but it is obvious that the fact was conceded to be as stated by the defendant's counsel. The State,

however, is precluded from taking any objection on this account, for the case sets out that the State introduced the record of "an indictment against Conrad Crayton and others," without naming them, or saying how many. This certainly does not prove the allegation of the indictment against Conrad Crayton and four others, (naming them,) and makes a wider variance than that which the defendant's counsel insisted upon. There is error. *Venire de novo.*

PER CURIAM. Judgment reversed.

JOHN ELLIOTT *vs.* NEIL McKAY, *et. al.*

A and B were tenants in common of a tract of land. A, with the sanction and assent of B, employed a surveyor to run the boundaries of their land, and in doing so, A, accompanied by the surveying party, committed a trespass on an adjoining tract; *Held*, that B was equally liable for such trespass.

ACTION of TRESPASS, q. c. f., tried before PERSON, Judge, at the Special Term, (June, 1856,) of Cumberland Superior Court.

The plaintiff showed title to, and possession of, the field in which the acts complained of were done.

The defendants claimed to be tenants in common of 1690 acres of land, and read a grant for the same to John Gray Blount, dated in 1789, but did not connect themselves in any way with Blount, or show any possession at the time of the alleged trespass. This grant lapped upon the land covered by plaintiff's title, but not so as to include the field. It was proved by one McNeil that the defendant Withers employed him to survey the Blount land; that McKay had nothing to do with his employment, so far as he knew. On a day appointed they met, when Withers said they could not go on with the survey without seeing McKay, (the other defendant.)

He sent a messenger to him, who brought back word for them to go on with the survey. They then proceeded, and McKay came to him on the next day in the woods, and continued with them during the remainder of that day. During the time he was with them, some difficulty arising as to the course of a line, he produced papers from his pocket by which the matter was set straight. During this time also, McKay offered to lease part of the same land, claiming to own one-half of it. When McKay parted with them he left no instructions about the survey; this was late on Saturday evening. On the Monday following, Withers, with himself (McNeil) and others, went on with the survey, and at a short distance from where they had stopped on the Saturday evening before, they entered the plaintiff's field and set up a stake as a corner.—They also marked some trees.

There was no exception to the charge, as to Withers, but McKay's counsel prayed the Court to instruct,

1. If McKay merely gave his consent to Withers to make a survey of the Blount grant for his (Withers') benefit, and on his account only, that McKay would not be liable for his acts.

2. If McKay authorised the survey for his own benefit, that even then, he would not be liable for the acts of Withers done in his absence, upon the land of the plaintiff, at a place where the Blount grant did not lap upon it, although these acts were committed by mistake, and not wilfully, in the prosecution of the survey.

The Court gave the instruction first above asked, but refused the second; for this the defendant McKay excepted.

Verdict for the plaintiff. Judgment and appeal.

Shepherd, for plaintiff.
Kelly, for defendants.

Battle, J. The only exception assigned by the defendant McKay, in his bill of exceptions, is that the presiding Judge refused to charge the jury "that if McKay authorised the

survey for his own benefit he would not be liable for the acts of Withers (his co-defendant) done in his absence upon the land of the plaintiff, at a place where the Blount grant did not lap upon it, although these acts were committed by mistake, and not wilfully, in the prosecution of the survey."

The case states that no exception was taken to the charge as to Withers. We understand from this, that his liability for the trespass committed upon the plaintiff's land in making the survey, is admitted. If this be so, and we see no reason to doubt it, we are unable to discover any difference in the principle applicable to his case and that of the defendant McKay. They were equally interested in the land surveyed and in the survey. It is true that McKay was not active in employing the surveyor, but he certainly acquiesced in it, and assisted actively in making a part of the survey. He was not present, indeed, on the day when the trespass was committed, but he knew that the survey was to be prosecuted and did not countermand it.

But it is said for him that the surveyor was the officer of the law, and he was not, on that account, responsible for the acts of one whom he had no right to control. It does not appear that the person employed was the County surveyor, and therefore that reason fails. But if he were the County surveyor, nothing is shown to make it compulsory upon the defendants to employ him rather than any other surveyor. But if that were conceded, the conclusion which the defendant McKay wishes to draw from it does not necessarily follow. It is certain that a sheriff is an officer of the law, and the only one whom a party can, in many cases, employ to levy an execution; yet a plaintiff may be liable who goes with him or gives him directions, and by mistake he seizes the goods of a wrong person. The fact is, that the surveyor was acting as much for the one defendant as the other; because they were both interested in the land surveyed, and though in different ways, they both assented to the survey. The surveyor was acting under the express or implied directions of both, and they are equally responsible for his acts, and for the acts of

each other, done in the scope of the business. There is no error.

PER CURIAM. Judgment affirmed.

WILLIAM CARTER *vs.* EDWARD A. STREATOR AND WILLIAM W. SANDERS.

One's agreement to work with his own slave for another by the day, gives the employer no interest in the slave to entitle him to bring an action, or to deprive the owner of a right of action, for taking away the slave while so employed.

In trespass or trover the defendant cannot, for the purpose of diminishing the damages, avail himself of anything which lessens the value of the property while in his wrongful possession.

ACTION OF TRESPASS, tried before CALDWELL, J., at the Spring Term, 1856, of Anson Superior Court.

The action was brought for seizing and selling a negro slave named John. The plaintiff, Carter, and one Kirk had jointly hired the slave for the year 1855. In May, of that year, their joint ownership was terminated by a contract between them, and John became the sole property of the plaintiff for the remainder of that year, and thenceforward was in his sole possession. After this separation the plaintiff hired himself and the said John to one Ragan, to work by the day; and while they were so working, the defendant Sanders sued out an execution against Kirk, which was put in the hands of the defendant Streator, and went together with him, and seized and carried away the said slave, and sold him for the remainder of the year. The sale took place on the 22nd of June, when the plaintiff was present and forbade the same.

The defendant proved that, after the sale, during two months, John was sick and unable to work, and insisted that it should go in mitigation of damages. He also insisted that the action should have been "case," and not "trespass."

His Honor ruled both these points against the defendants, and, under a charge according to this opinion, the jury found for the plaintiff.

Defendants excepted. Judgment and appeal.

Dargan, for plaintiff.

No counsel appeared for defendants in this Court.

Battle, J. There is nothing in the bill of exceptions which can justify us in reversing the judgment which the plaintiff obtained in the Superior Court. At the time when the slave in question was levied upon and sold under the execution in favor of one of the defendants against Kirk, the latter had no interest in him. This seems to have been conceded by the defendants; for their only objection to the plaintiff's right to recover is, that his form of action was misconceived. They say that, by his contract with Ragan, the possession of the slave became vested in Ragan during the time for which the plaintiff and his slave were to work for him, that consequently the plaintiff's interest was only reversionary, for an injury to which, "case," and not "trespass," was the proper remedy. This objection is founded upon an entire mistake as to the effect of the contract with Ragan. The plaintiff did not thereby part with the possession of his slave; on the contrary, he was necessarily to continue it in order to be able to fulfil his contract for working himself and his slave by the day. If the possession had been Ragan's he might have maintained trespass or trover for the same, which cannot be seriously contended for.

The instruction as to damages was undoubtedly correct. In trespass or trover the defendant cannot, for the purpose of diminishing the damages, avail himself of any thing which lessens the value of the property while he is in the wrongful possession of it. Had the slave died the day after he was taken by the defendants, they would have been liable to the plaintiff for the full value of his interest in him.

Per Curiam. Judgment affirmed.

GEORGE W. GORDON *vs.* WILLIAM G. WILSON.

A deed conveying slaves as a gift, but reserving "enough of the hire of the said slaves comfortably to support" the donor, is not a deed in trust, but a deed of gift, and is not required to be registered within six months. The Act of 1854, ch, 19, extending the time for registering deeds of gift to two years, applies to one executed April 8th. 1853, a year not having expired from its date to the time of that act's going into operation.

A deed of gift, expressed to be for natural love and affection towards a bastard child, is good at common law, though there is no delivery of the thing given at the time of its execution.

ACTION OF DETINUE, tried before BAILEY, J., at the last Fall Term of Currituck Superior Court.

Upon the trial below, it was admitted that the slaves in question belonged to one Mary Wilson, who, in July, 1855, intermarried with the plaintiff, and that he was entitled to them, unless the title had been divested by a deed of gift to Willis C. Wilson, who was an illegitimate son of the said Mary Wilson, and for whom the defendant held the slaves as guardian. The following is a copy of this deed of gift:

"To all people to whom these presents shall come, I, Mary Wilson, of the County aforesaid, send greeting: Know ye that I, the said Mary Wilson, for and in consideration of the natural love and affection which I have and bear unto my beloved son, Willis C. Wilson, of the County of Camden, and State of North Carolina, and for divers other causes and considerations me hereunto moving, have given and granted, and by these presents do give and grant, unto the said Willis C. Wilson, all and singular, the following negroes, (naming them) to have and to hold, with their increase, with a reserve of enough of the hire of the said negroes to comfortably support me while I live. * * To have and to hold, all and singular, the aforesaid negroes to the said Willis C. Wilson, his adm'r. and ex'r. and assigns forever." (With a clause of general warranty.) Dated April 8th, 1853. Proven before Camden

County Court, at Oct. Term, 1855, and registered on the 31st of the same month.

It was objected,

1. That the said writing not having been proved within twelve months was void.

2. That being a conveyance in trust, it was void for not having been registered within six months.

3. That the said writing was not within the act of 1854, giving further time for registration.

4. That the consideration expressed in the deed, being love and affection for an illegitimate child, was insufficient to raise a use and transfer the slaves without actual delivery.

His Honor, being of opinion against the plaintiff on these several points, admitted the deed to be read; for which plaintiff's counsel excepted.

Verdict and judgment for defendant, and appeal.

Smith, for plaintiff.

Heath and *Pool*, for defendant.

Battle, J. The instrument of writing under which the defendant held the slaves in controversy, is neither a mortgage nor a deed in trust, but simply a deed of gift, with a reservation to the donor of a support for life out of the hires of the slaves.

Whatever effect this reservation may have in fixing a charge upon the slaves in the hands of the donee, it cannot alter the nature of the instrument with respect to the operation upon it of the registry law. As a deed of gift of slaves, the 17th section of 37th chapter of the Revised Statutes, (which was the law in force when it was executed) required it to be registered within one year after its execution; but before the year had expired, the act of 1854, ch. 19, extended the time two years longer, within which period it was, in fact, regularly proved and registered. This is a full and complete answer to all the objections founded upon a want of a proper registration.

The only remaining objection is equally untenable. Being a deed of gift of personalty, it operates *proprio vigore* at common law by its delivery, to convey the title, and does not depend upon the effect of the statute of uses, as in the case of lands, to transfer the seisin to a use raised upon a sufficient consideration. If an authority were necessary for this proposition, the case of *Irons* v. *Smallpiece*, 2 Barn. and Ald. 551 (4 Eng. Com. Law Rep. 635,) is directly in point. There, ABBOT, C. J., says, that "by the law of England, in order to transfer property by gift, there must be either a deed or other instrument of writing, or there must be an actual delivery of the thing to the donee." This clearly implies that a deed of gift is equivalent to an actual delivery of the thing, and such, we believe, has always been understood to be the law of this State.

PER CURIAM. Judgment affirmed.

J, K. GREEN AND WM. K. LANE, ADMR'S., *vs.* JOHN A. KORNEGAY.

A deed in trust was made to one who had no knowledge of its execution at the time, but shortly afterwards, on being informed of the fact by the draftsman of the deed, he assented to it, agreed to act as trustee, and appointed an agent to get possession of the property, who had the deed registered, and proceeded, as agent, to demand and sue for the property; *Held*, that this was a sufficient delivery of the deed, though it had never actually been in the hands of the bargainee.

A deed in trust to secure a separate use in property to a wife, is not required to be proved and registered within six months, or be void as to creditors and purchasers.

A voluntary conveyance of personal property passes the legal title as to *subsequent purchasers*, though void as to creditors.

A creditor can only take advantage of a voluntary and fraudulent conveyance by reducing his claim to a judgment, and seizing the property under an execution.

An action accruing to a lunatic can only be brought in his name.

THIS was an ACTION of DETINUE, tried before SAUNDERS, J., at a Special Term, December, 1856, of Wayne Superior Court.

The plaintiffs claimed title to a negro slave named Martin, by virtue of a deed in trust, executed in September, 1852, by one Henry Roberts to John A. Green, the plaintiffs' intestate. The consideration expressed in this deed was one dollar, and the trust was for the sole and separate use of Nancy P. Roberts, the wife of the said Henry, during her life, and after her death to be reconveyed to the said Henry. The subscribing witness, who was a member of the bar, proved that Roberts came to his office on the day of the date of the deed, which was the 11th of September, 1852, and requested him to draw this deed and another, by which he, said Roberts, conveyed to a trustee, for the benefit of his wife, a house and lot near Goldsboro'. He drew the deeds as requested, and that for the slave had been in his possession ever since its execution up to the trial of this suit, except when it was in the hands of the public register for registration. He stated that it never had been in the hands of John A. Green, but that some days after its execution he made the transaction known to him, when he agreed to act as trustee and gave witness authority to act as his attorney in any matter necessary to secure the possession of the slave Martin. Witness, by virtue of this authority, demanded the slave from the defendant, which he refused to deliver, and a few days thereafter brought this suit. This witness also proved that the bargainee, John A. Green, after the execution of the deed, to wit, in the winter of 1853 and 1854, was insane, and that, in March following, he died in a lunatic asylum, and that, some year or two before the bringing of this suit, Green had had occasional attacks of insanity. The writ in this suit was issued 21st of Feb., 1854. The deed was registered April 8th, 1853.

The defendant then offered in evidence a deed from Roberts to him for the slave, Martin, bearing date 11th October, 1852, and registered within the next month, and proved a full price and the *bona fide* payment of the consideration, in money, and in money's worth. He also proved, that after

Roberts had made this conveyance to the defendant, he said that he had made a deed for Martin, and for the house and lot near Goldsboro', but that the deed was good for nothing.

There was evidence introduced in behalf of the defendant, tending to show that, at the time of the deed from Roberts to Green, the bargainor was largely indebted, and nearly, if not quite, insolvent; and that he was, at that time, indebted to the defendant in the sum of $360; and there were, also, other circumstances tending to show that the deed to Green was voluntary and fraudulent.

It was also proved that, in Nov., 1852, Green told witness that he never had seen the deed which Roberts had made to him; that he should not act as trustee, and should bring no suit for the recovery of the slave Martin.

The defendant contended,

1. That the deed under which the plaintiffs claimed was never delivered, and the said John A. Green had never accepted the trust.

2. That the deed in trust had not been registered according to law.

3. That the deed, being voluntary, was fraudulent, and void as to the defendant; first, because he was a purchaser for a full and fair consideration without notice, and secondly, because he was a creditor.

4. That the insanity of Green, after appointing his agent, was a revocation of the authority to demand the slave and bring this suit.

His Honor decided these several points against the defendant, and instructed the jury accordingly; upon each of which defendant excepted.

Verdict and judgment for plaintiffs. Appeal by defendant.

Bryan, for plaintiffs.
W. A. Wright, for defendant.

Battle, J. Neither of the objections urged against the

right of the plaintiffs to recover the slave in question is of sufficient force to prevent it.

1. The deed was undoubtedly delivered, if not before, as soon as the draftsman informed the bargainee of it, and he had consented to act under it as trustee for the feme covert. *McLean* v. *Nelson*, 1 Jones' Rep. 396.

2. The second objection has been properly abandoned here. The deed in question was not intended as a security for money, and is not, therefore, one of those deeds in trust which must be proved and registered within six months, or be void as to creditors and purchasers.

3. The recent case of *Long* v. *Wright*, 3 Jones' Rep. 290, shows that the defendant, as the subsequent purchaser of a personal chattel, could not set aside the prior conveyance to the plaintiffs' intestate. The case of *Williford* v. *Conner*, 1 Dev. Rep. 379, is equally in point to show that, as a creditor, the defendant could take advantage of the deed to the intestate's being voluntary and fraudulent, only by reducing his debt to a judgment and seizing the property under an execution.

4. The action was properly brought in the name of John A. Green, the plaintiffs' intestate, though he were a lunatic at the time. *Brooks* v. *Brooks*, 3 Ire. Rep. 389. We are aware that it is said in Stock on Non Compotes, 211, (15 Law Lib. 117,) that in England the committee of a lunatic's estate "can neither bring nor defend actions or suits on behalf of the *non compos mentis*, without previously obtaining the permission of the Court to do so." See *Largent* v. *Berry*, 3 Jones' Rep. 531. How the objection is to be made, or whether it can be made at all by the other party on the trial, it is unnecessary for us to enquire. Here the plaintiff died, and his administrators are made parties, and they can undoubtedly recover any property to which their intestate was legally entitled, and which is unlawfully detained from them.

There is no error, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM H. JOHNSON, TO THE USE OF JESSE H. ADAMS, *vs.* BASSET SIKES, *et. al.*

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority for an attorney at law to appear in a cause in Court, although the agent has no written authority to make the power.

APPEAL from the Fall Term, 1856, of Wilson Superior Court, MANLY, J., presiding.

William H. Johnson, the plaintiff, had sold the note on which this action was brought to Jesse H. Adams, but had not endorsed the same. On the return of the writ in this case to the County Court, the defendants' attorney required of the attorney for the plaintiff to produce a written authority to carry on this suit, or that the same be dismissed. Thereupon Mr. Howard produced a power of attorney in due form, signed "W. H. Johnson by Jesse H. Adams." This was objected to by the defendants' counsel as not being properly executed, but was ruled by the Court to be sufficient, whereupon the defendants appealed to the Superior Court.

The same objection was urged by the defendants' counsel in the Superior Court, but was overruled by his Honor, and he gave judgment "that there was no error in the Court below;" whereupon the defendants appealed to this Court.

Howard, for plaintiffs.
Dortch, for defendants.

PEARSON, J. The legal effect of a contract for the sale and delivery of a bond, which is handed over to the purchaser without endorsement, is to constitute the purchaser an agent of the obligee to receive the money. *Hoke* v. *Carter*, 12 Ire. 325. Being the agent to receive, he of course has authority to bring suit in the name of the principal, and do all other acts necessary for the collection of the bond,—such as giving a written power to an attorney at law to bring suit.

It is insisted that, under Statute Rev. Code, ch. 31, sec. 37,

by which every attorney who claims to enter an appearance, may be required to produce a power or authority signed by the party, or "by some person duly authorised in that behalf," is not complied with by the production of a power signed W. H. Johnson, (the obligee) by Jesse H. Adams, (the purchaser) agent; because, as was contended, the agency ought to be proved by writing, and the authority to sign the name of the principal cannot be shown by parol. There is no case or principle to support this position. The statute requires the power to the attorney to be in writing, signed, &c., but the authority to sign the name of the principal is not required to be in writing.

The decisions upon the statute of frauds settle this question. Certain contracts are made void unless put in writing and signed by the party to be charged therewith, or "by some other person by him thereto lawfully authorised." Rev. Code, ch. 50, sec. 11. It is settled that the authority of the person signing the name of one, as his principal, need not be in writing. Indeed, if the name is signed without even a parol authority, a subsequent ratification will make it valid within the statute. *Chitty* on Contracts, 71, and other text books.

The form of the judgment set out in the record is agreeable to law. *Russell* v. *Saunders*, 3 Jones' Rep. 432.

There is no error.

PER CURIAM. Judgment affirmed.

MILES DAVIS *vs.* AMARIAH BURNETT.

Where a joint owner of property, authorised to sell, warrants the soundness of the property, which turns out to be defective, and the seller pays for the defect without suit, the other joint owner is liable to contribute to the loss in proportion to his interest.

ACTION OF ASSUMPSIT, tried before SAUNDERS, J., at the Fall Term, 1856, of Martin Superior Court.

The plaintiff declared on a special contract of indemnity, and on all the common counts.

The plaintiff, the defendant, and one Taylor, owned jointly and equally a quantity of corn, which was in a crib, never having been divided. The plaintiff, representing himself as the agent of the others, sold the corn to P. P. Clements at two dollars a barrel, and agreed in writing to deliver it on board a vessel when called for, in merchantable order. Shortly afterwards Clements, meeting the defendant, informed him that he had bought the corn at two dollars per barrel, but gave him no further information as to the terms of this agreement, to which he replied, "it was right." Clements assigned his interest in the contract to Waldo and Yarrell, and authorised them to receive the corn. A dispute arose between Waldo and the plaintiff as to whether the corn was in merchantable order, when the former refused to receive it unless the plaintiff would make it merchantable in Norfolk; this the plaintiff agreed to do, and thereupon the corn was delivered. The defendant was not present at this conversation, nor had he been informed of it. After the corn was delivered on board the vessel, and before its arrival at Norfolk, Clements paid plaintiff and defendant each his share of the price at two dollars per barrel. It was known to Waldo and Yarrell, as well as to Clements, that Davis, the plaintiff, owned but one-third of the corn. On arriving at Norfolk the corn was found to be unmerchantable, and the difference between that and sound corn was $246, 44, which was paid by the plaintiff to Waldo without suit.

The plaintiff demanded of the defendant one-third of the sum paid by him, for the deficiency in the corn, which being refused, this action was brought. The Court gave judgment for the plaintiff, upon a case agreed embracing these facts, from which the defendant appealed.

Donnell, for plaintiff.

Winston, Jr., and Rodman, for defendant.

Nash, C. J. Three questions present themselves in this case. 1st, Was the plaintiff the agent of the defendant in selling his portion of the corn? 2nd. Had he the power to warrant the soundness of the corn, and thereby bind the defendant? 3rd. Can he maintain the action upon either of the counts in his declaration?

As to the first. The plaintiff and defendant, and one Taylor, were the joint owners of a parcel of corn lying in bulk in a crib, each owning one-third. The plaintiff sold the whole to one Clements at two dollars per barrel, to be delivered on board of a vessel, when called for, in good merchantable order. Clements subsequently informed the defendant that he had purchased the corn at the price stated, but did not inform him of any other terms. The defendant replied, "it is right." Clements, subsequently, paid the plaintiff his one-third of the price of the corn, and the defendant his third. These facts sufficiently show that Davis was the agent of the defendant to do this particular thing—that is, to sell his portion of the corn, unrestricted by any special instructions.

2nd. An agent to sell personal property has, by law, power to bind his principal by a warranty of soundness. Brown on Actions, 174; Paley on Agency, 210. The employment gave the power. *Hilyear* v. *Hawke*, 5 Esp. N. P. cases, 75; *Hunter* v. *Jameson*, 6 Ire. Rep. 252. The contract between plaintiff and Clements was for the corn to be delivered on board of the vessel, when called for, in good merchantable order. This contract was in writing, and signed by the plaintiff alone. When Waldo and Yarrell, who had purchased from Clements his contract, applied for the corn, they refused to receive it, upon the ground that it was not such an article as they had bargained for, not being in good merchantable order, unless the plaintiff would make it merchantable in Norfolk. This he agreed to do. At Norfolk it was shown that the corn was not merchantable, and the plaintiff paid to Waldo and Yarrell the difference between the corn as it was, and what it was agreed it should be. Was the defendant bound by the contract he made with the purchaser? The authorities above

cited show that he was, to the amount of his interest in the corn. On this point our attention was called to the cases of *Meadows* v. *Smith*, 12 Ire. 18; *McCall* v. *Clayton*, Bus. 422. Both these cases differ materially from this. In neither of these did the agent have any interest in the subject matter of the agency. In the first, the contract was made for the building of a flat for Smith, the defendant. In the other, the note or due bill, the foundation of the action, was signed George Clayton, "agent for Davidson's River Navigation Company." In both these cases the Court say that, by their respective contracts, the agents were not bound, but that their respective principals were, and that their payments were officious acts, and they could not recover from the respective defendants the money so paid without their request. Can the money paid by the plaintiff be considered officious? The corn sold was the joint property of the plaintiff, and of the defendant and Taylor, lying in bulk, undivided; and the plaintiff was the agent of the two latter to sell their shares, and the whole was sold as sound. When it was ascertained that the corn was not merchantable, the purchasers might have refused to receive it, and were induced to do so only on the condition that the plaintiff would guarantee its merchantable quality at Norfolk; this he did. As to his third, he acted for himself, as to the other two thirds, as the agent of the defendant and Taylor. But the contract was one. He could not guarantee his third without guaranteeing the whole, for the corn was undivided. By his contract he bound himself for the whole and was answerable for the whole. Although the purchasers knew that two-thirds of the corn belonged to Burnett and Taylor, they also knew that one-third belonged to the plaintiff.

It is in general true, that where an agent, at the time of making a contract, discloses his principal, he is not personally answerable, but where he binds himself, he is answerable; and if made to suffer in damages arising out of the contract, he is entitled to compensation from his principal. *Hunter* v. *Jameson*, *ubi supra*.

We are of opinion, for the reasons above stated, that the plaintiff can maintain his action.

PER CURIAM. Judgment affirmed.

HOELL AND CORY *vs.* JAMES L. PAUL.

Where there has been a temporary exchange of articles, there is no principle that requires that the one shall be returned to the former owner before the other can be recovered.

ACTION OF TROVER, tried before SAUNDERS, Judge, at the Fall Term, 1856, of Pitt Superior Court.

The action was brought for the conversion of a refrigerator.

One James had temporarily exchanged the refrigerator in question with Mrs. Worthington, and sold it, while in her possession, to one Bell, who sold it to the plaintiffs. The refrigerator which Mrs. Worthington put in the possession of James, and which was her property, went from James' possession into that of Bell, and from his into the possession of the plaintiffs, who were still in possession of it when the demand in this case was made, and the suit brought. The plaintiffs had never claimed the refrigerator which they had received of Bell, (originally Mrs. Worthington's,) nor had the defendant, or any one else, ever demanded it.

The defendant's counsel requested the Judge to charge the jury, that on a mutual exchange of goods for an indefinite period, the party seeking to terminate the bailment must offer to surrender those in his possession belonging to the other party. His Honor declined to do so, but told the jury that if they believed that the plaintiffs had demanded the refrigerator of the defendant, before suit was brought, and that the defendant had refused to deliver it up, and had converted it to his own use, the plaintiffs were entitled to recover. Defendant excepted to this charge.

The jury found a verdict for the plaintiffs. Judgment and appeal.

Rodman, for plaintiffs
No counsel for defendant in this Court.

Battle, J. The defendant does not deny that the article, for the conversion of which suit was brought, belonged to the plaintiffs, but his counsel contends that a return, or offer to return, the article which they had taken upon a temporary exchange with him, is in the nature of a condition precedent to their right of recovery. No authority is cited for this position, and we are not aware of any adjudicated case, or principle, upon which it can be sustained. The transaction between the parties, or rather between those to whose rights they succeeded, created a mutual bailment which each had a right to put an end to by making a demand of the thing bailed. If the article in the possession of one of the parties had been lost or destroyed, without any default of the bailee, it certainly would not have justified the other party in detaining the thing exchanged, because the former could not return, or offer to return, his chattel. The doctrine contended for by the defendant would be extending the principle of lien beyond any former precedent, and further than there is any necessity for its existence. What might have been the result had the plaintiffs claimed the defendant's property, or had even refused to deliver it on demand, it is unnecessary to decide, for they had never done either. So far as appears, the defendant could, at any time, have regained the possession of his refrigerator, and his neglect to do so, gave him no right to refuse on demand to deliver up that of the plaintiffs.

Per Curiam. Judgment affirmed.

M. N. HARRISON *vs.* JOSIAH BRIDGES.

Where, from the loose manner in which the parties have dealt with each other, it is not possible to show the precise quantity of commodities delivered, or their quality, or value, it is proper to allow jurors to act on evidence which will enable them to approximate the truth of these facts.

ACTION OF ASSUMPSIT, tried before SAUNDERS, J., at the Fall Term, 1856, of Nash Superior Court.

The plaintiff declared on a special agreement: that in consideration of his services as clerk and general manager of defendant's store, the latter was to distil and carry off, free of charge, all such turpentine as plaintiff might make and deliver during the year. The plaintiff produced evidence tending to show that he had cultivated a sufficient number of pine trees, with two good hands which he had employed, to make six hundred barrels of *dip and scrape;* that he had also employed, at short intervals, four or five other hands. He also offered evidence to show that he had a wagon and team engaged in hauling turpentine to the defendant's distillery, but was unable to prove the precise number of barrels delivered. He further showed, by evidence, the number of gallons of spirits that could be distilled from 600 barrels of turpentine.

The defendant then produced in evidence a day-book kept by plaintiff, which was in his hand-writing, and in which were entries, for several months during the year, of the quantity of spirits distilled.

On this evidence the defendant's counsel moved the Court to instruct the jury,

1st. That the plaintiff could not recover, because he had failed to show the precise quantity of turpentine delivered.

2nd. That, if entitled to recover, he could not recover for a larger quantity than was mentioned by the entries made by the plaintiff himself in the day-book.

The Court instructed the jury that the plaintiff had to satisfy them as to the quantity of turpentine delivered, and this they were at liberty to collect from a fair construction of the

facts and circumstances offered in evidence. That, as to the quantity of turpentine made and distilled, they were to examine for themselves the day-book, and decide whether that contained a full account of the whole quantity made, or otherwise. Defendant excepted.

Verdict and judgment for plaintiff. Appeal.

Miller and *Dortch*, for plaintiff.
Moore, for defendant.

Pearson, J. There is no error. From the loose manner in which the parties dealt with each other, it was impossible to show the *precise* quantity of turpentine which the plaintiff had delivered, or the precise quantity of spirits for which the defendant was accountable. In such cases it is every day's practice to allow jurors to act upon evidence which will enable them to *approximate* the true quantity; positive precision being out of the question, unless there is an actual measurement.

Upon the same ground, in regard to quality and value, witnesses are allowed to give their opinion, and the result is left to the good sense of the jury.

In respect to the entries in the day-book, the statement of the case is so meagre, and so few details are set out, that we are not able to see the "point." The plaintiff acted as clerk in the defendant's store, but it does not appear that it was his business to keep a full account of the quantity of spirits distilled. He, it seems, entered the quantity of spirits distilled for several months during the year. Whether this included all the spirits distilled during "the several months," or was confined to the spirits produced from the turpentine which he had delivered during that time, is not stated; nor is it stated who made the entries during the rest of the year; consequently, we can see no error, and the judgment is affirmed.

Per Curiam. Judgment affirmed.

WILLIAM LANCASTER *vs.* JOSEPH BRADY, ADM'R.

Where the merits of a case tried before a justice of the peace, are clearly and decidedly for the party cast in the trial, and there were circumstances tending to show fraud and collusion between the successful party and the magistrate, who were brothers, to deprive the former of a fair trial, and of the right to appeal; *Held*, that a recordari was proper to be issued, and a new trial should be had.

PETITION for a RECORDARI in the Superior Court of Craven County. On the return of the writ of recordari, which had been issued in this case, the petitioner's counsel moved that the cause recorded and sent up to the Superior Court, should be placed on the trial docket, his Honor, Judge MANLY, presiding.

The petitioner, in his petition, set forth that the defendant, as the administrator of one Caswell Gardner, suing to the use of George W. Street, obtained a judgment against him before one Samuel R. Street, a justice of the peace of Craven County, on a certain day in October, 1855, for sixty dollars and seventy-five cents, with interest on the same from the 27th of March, 1848, on a note which petitioner had given to Caswell Gardner on said 27th of October, 1848. He further alleges that on the 12th of September, 1848, he paid Caswell Gardner sixty dollars on that note, and took his receipt for the same, which he has ready to produce. He states that when he made this payment, Gardner said he had not the note with him, but it was supposed to be nearly enough to discharge the amount; and that he heard nothing of this from that time until George W. Street presented it to him for payment, stating that he had bought it from John Z. Gardner, a son of the said Caswell, for twenty-five dollars, although the petioner is amply good for the amount. He alleges further that he then stated to George W. Street, the facts in relation to the payment, and offered to pay him the small balance actually due on the note, but as he did not have the receipt with him nothing more was done in the premises, except that Street

agreed, if the receipt was not too large, he would allow it, and make a fair settlement.

He further alleges, that some time in September, 1855, he was warranted on said note, and ordered to trial before Samuel R. Street, a brother of the said George W., at Swift Creek Bridge, on the ——— day of ———, and that he attended on the day, and at the place, (arriving there about 12 o'clock) when he was informed that his case had been tried, and a judgment rendered against him for the full amount of the note, and that the magistrate had gone off with the papers. He says that, being ignorant of the law, and at a distance from any one with whom to counsel, he asked several intelligent gentlemen who were present for advice, who informed him that a new trial in the case was a matter of discretion with the magistrate, and as it was plaintiff's brother who had the papers, in all probability he would not grant one, and that the petitioner could not appeal, because he was not present at the trial. Before he could obtain legal advice the ten days had expired. He says he intended to be present at the trial with his receipt, but was unavoidably prevented from doing so.

George W. Street, for the defendant, in his answer says, that he knows nothing of the payment and receipt, but what the petitioner told him, and he replied on that occasion, that if the receipt was just and right he would allow the same. He says he is informed and believes that Lancaster, the petitioner, did not make his appearance on the day and at the place of trial until about 4 o'clock.

Spier, the officer, states in an affidavit, that he summoned the petitioner to appear in the case mentioned, at 12 o'clock, on 1st of September, 1855, before Samuel R. Street, and that the warrant was not returned until about 3 1-2 o'clock on the day; that the said petitioner had not then made his appearance.

Samuel R. Street, the justice of the peace before whom the warrant was tried, stated to the same effect with the affiant Spier.

Riley Causey's affidavit establishes the genuineness of the receipt for sixty dollars alleged by the petitioner.

On considering the motion submitted, his Honor stated that "the excuse of the petitioner for not producing his receipt before the justice, and appealing, in case it was not allowed, is not explicit or entirely satisfactory; but the merits in respect to the payment alleged, seem to be so decidedly in his favor that I have thought it right to give him an opportunity to establish it before a tribunal not akin to either party." Accordingly he granted a new trial, and ordered the case to be put on the trial docket. From this decision the defendant appealed.

No counsel appeared for the plaintiff in this Court.
Green, for defendant.

Nash. C. J. There is such a conflict in the testimony relative to the circumstances attending the trial before the magistrate, that we have been in some doubt as to the judgment to be rendered. The petitioner swears that he did attend at the place, and at the time, to which he was summoned—at 12 o'clock of that day, when he was informed that the trial was over and judgment rendered against him, and that the magistrate had gone away; that he consulted some persons present what course to pursue, when he was told, not being at the trial to obtain an appeal he must procure a new trial. This he did not attempt to do, for he was further told, the magistrate, who gave the judgment, was the brother of the plaintiff, and would not grant him one. The justice and the officer both swear that the judgment was not given till three o'clock, and that delay was occasioned by the non-attendance of the petitioner. The note is for sixty dollars and seventy-five cents. The petitioner swears that he paid to Caswell Gardner, on the note, the sum of sixty dollars, on the 12th of September, 1848; that the note not being present, he took from Gardner a receipt for the amount, neither of them remembering the exact amount. Upon these affidavits, consid-

ered alone, we should refuse the application. But there were other circumstances attending the case, which lead us to think there was foul play. The plaintiff in the judgment, knew that the defendant claimed a credit on the note of sixty dollars, evidenced by a receipt, leaving but a small sum due. He treated with the defendant upon the basis of that receipt. He was the purchaser of the note from the son of Caswell Gardner, to whom it was payable, at the price of twenty-five dollars, and agreed to allow the payment if not too large; yet, the judgment is taken, without reference to the payment, for the full amount of the note. Again, the receipt given by Caswell Gardner to the petitioner, for sixty dollars, is proved by Riley Causey, to be in the hand-writing of Gardner. The petitioner alleges he paid the money on the note on the 12th of September, 1848, and heard no more of it until presented for payment by the son of Caswell Gardner, who was then dead, and had been for some time. The note bears date 28th of March, 1848. Now, it may be asked, why did not Caswell Gardner, in his life-time, endeavor to collect the note? Why did not his administrator, Brady, do so? From September, 1848, the date of the receipt, to July, 1855, near seven years, the note is permitted to lie dormant. These things are mentioned not as proving the existence of the receipt, but as circumstances to prove that the trial before the magistrate Street was not obtained in good faith, but in fraud of the rights, of the petitioner. Another strong circumstance showing the fraud is, that the magistrate, who gave the judgment, was the brother of the plaintiff. The law forbids any one to try his own cause, and justice, propriety and delicacy, forbid a Judge to sit in judgment in a matter affecting the interest of a near relative. I am proud to say, it is the first instance of the kind within my knowledge in North Carolina. But again, the conduct of this magistrate, after rendering the judgment, was such as to excite strong suspicion, that he did not intend that the defendant should get either an appeal or a new trial. When the defendant got to the place of trial, he found judgment given against him, and that the magistrate had gone off

with all the papers. A party complaining of a magistrate's judgment must pray his appeal at the time of the trial, but surely the law does not require it to be done *instanter*. He has the whole day within which he may appeal, or surely a reasonable time to make up his mind whether he will appeal or not. But the defendant might have applied to another magistrate for a new trial if Street had not taken the papers with him. In cases allowing an appeal, the party complaining and suing for a recordari, must show that he was prevented from appealing by fraud, accident or mistake.

In the language of his Honor, "the excuse of the petitioner for not producing his receipt before the magistrate, and appealing in case it was not allowed, is not explicit or entirely satisfactory; but the merits in respect to the payment alleged, seem to be so decidedly in his favor, that I have thought it right to give him an opportunity to establish it before a tribunal connected with neither party." For the reason so assigned by his Honor, and upon the well-grounded suspicion of fraud on the trial, we think with his Honor, that the petitioner is entitled to his recordari, and that the case should be placed on the trial docket as he swears to its merits. This opinion will be certified.

The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* GUILFORD, A SLAVE.

Where a record shows that a grand jury was drawn and empannelled, sworn and charged to enquire for the State, of and concerning all offences, &c., and by such grand jury, "it was presented in manner and form following, that is to say," setting out the bill of indictment, the record is sufficient without copying the entry of "a true bill," usually found on the backs of indictments.

State *v.* Guilford.

THIS was a TRIAL for MURDER, tried before SAUNDERS, J., at the Fall Term, 1856, of Wake Superior Court.

The prisoner was found guilty of murder, and a motion was made in arrest of judgment, but upon what grounds the record does not show. In this Court the prisoner's counsel moved in arrest, upon the ground that it does not appear from the record that the bill of indictment, upon which the prisoner was tried, was found by a grand jury to be a true bill.

That part of the record pertaining to this point, is so fully recited in the opinion of the Court, that it is not deemed necessary to set it forth here.

The motion was overruled and the prisoner appealed.

Attorney General (*Bailey*) for the State.
Miller, *G. W. Haywood*, and *Husted*, for defendant.

PEARSON, J. The prisoner's counsel moved to arrest the judgment upon the ground that it does not appear from the record that the bill of indictment was found by the grand jury a true bill; and he insists that, for aught that appears, the prisoner may have been arraigned and tried upon an indictment which had never been passed on by a grand jury.

We think it does appear from the record, without the aid of any presumption, or intendment, that the indictment was passed on by the grand jury, and a true bill found. The record states, "and thereupon by the oath of (18 persons, naming them,) "good and lawful men, of the County aforesaid, then and there drawn from the said venire, and then and there empannelled and sworn, and charged to enquire for the State, of, and concerning, all crimes and offences committed within the body of the said County, it is presented in manner and form following: that is to say," setting out the bill of indictment at large.

The manner of presenting a bill of indictment is, for the grand jury, after having examined the witnesses on the part of the State, touching the allegations set out in the indictment, to come into open Court and return the bill endorsed

"A true bill," which is done by the foreman, acting for the grand jury, and the return is made in their presence. If the grand jury do not pass the bill, *they refuse to present it*, which is signified by the endorsement made by the foreman, "Not found," or "Not a true bill," or "Ignoramus."

It is not necessary that the record should set out the manner in which a bill of indictment was presented, or the evidence and memoranda, and entries, from which the record was made up. It is sufficient, and most proper, that the record should only set out the *fact* that it was presented by the grand jury. This avoids all that useless detail with which records are frequently encumbered; such as, who was appointed foreman, the signature of the foreman, the signature of the attorney for the State, what witnesses were sworn and sent, and (as we find, in many cases, by an examination of the files of the Court,) who was the constable of the grand jury. Such matters constitute no part of the record, but are minutes from which the record is made up. *State* v. *Collins*, 3 Dev. 117; *State* v. *Calhoun*, 1 Dev. and Bat. 376; *State* v. *Roberts*, 2 Dev. and Bat. 540.

The form of the record in this case is taken from "Eaton's forms." It is a "concise, legal and logical statement" of all that constitutes the record, or properly makes a part of it, and Mr. Eaton is entitled to the thanks of the public for its introduction. It was used in *State* v. *Peace*, 1 Jones' Rep. 250, (June Term, 1854) and passed without objection, and judgment was pronounced on the prisoner. It is taken from the appendix, 4 Black. Com., and is the form used in England.

It was insisted by the prisoner's counsel that the matter set out in this record is a *presentment* as distinguished from an *indictment*, in the sense in which these words are used in the Declaration of Rights, sec. 8.—"That no freeman shall be put to answer any criminal charge, but by indictment, presentment or impeachment," and that the trial and proceedings upon the matter set out in this record were illegal and in violation of the act of 1797, which provides—"No man

shall be arrested, or charged before any Court, on a presentment made by a grand jury, before the attorney acting for the State shall prepare a bill, and the bill be found by the grand jury to be a true bill."

The distinction between an indictment and a presentment is this—an indictment was a charge of some criminal offence, formally drawn up by an attorney for the crown, (or State,) and found by a grand jury, upon the *oath of witnesses*, and presented by the grand jury to the Court. A presentment was a charge of some criminal offence drawn up by the grand jury, not usually with much attention to the necessary averments, and found upon the testimony of some of *their own body*, and presented by the grand jury to the Court. The object of the 8th section of the Declaration of Rights was to forbid the practice of putting persons to answer a criminal charge upon *informations* made by the officer for the crown, without the intervention of a grand jury. Prior to the act of 1797, it was found that the "presentments" made by the grand juries were frequently so informal that a trial could not be had upon them, and very frequently the presentment would set out a matter which was not a criminal offence; so that sometimes the citizen was arrested and greatly oppressed when he had committed no violation of the public law, and oftentimes he was put to the trouble and expense of a trial, when, if the public law had been violated, the charge was made without the averments necessary to insure certainty in judicial proceedings, and it was necessary to enter a *nol. pros.* and send a bill of indictment. To remedy these evils, the act of 1797 was passed, but it made no change in the distinction between an indictment and a presentment. They were both presented by a grand jury, and, in a general sense, "presentments" of the grand jury; but the matter set out in this record is, to all intents and purposes, as much a bill of indictment since that act as it was before.

This question is discussed in *State* v. *Roberts*, *ubi supra*, where it is said, "The act of 1797 does not require any change

in the form of the entry in the case of an indictment, &c." There is no error.

PER CURIAM. Judgment affirmed.

H. M. AND WM. M. DAUGHTRY *vs.* JOHN BOOTHE.

Where the terms of the hiring of a slave are proclaimed previously to the public exposure of the slave for hire, one of which was, that he was not to be removed beyond the limits of the County, a bond subsequently given for the price and containing some other stipulations as to the treatment and management of the slave, does not supersede the parol contract as to removing the slave.

ACTION on the CASE, tried before BAILEY, J., at the Fall Term, 1856, of Gates Superior Court.

The action was brought for a breach of a contract of hiring. One *Parker*, the auctioneer, testified that he offered the negro Jack, among others, for public hiring, on the 25th of December, 1852; that it was publicly announced by him as one of the terms of the hiring, that the slaves were not to be taken from the County of Gates; he then immediately proceeded to the hiring, and the slave Jack was bid off by the defendant. It was further proved on behalf of the plaintiffs, that in the month of May, 1853, the said slave was removed by the defendant to the County of Bertie, where he remained the balance of the year in a shingle swamp. He was restored to the defendants in the beginning of the year, 1854, in bad health, and died in January of that year.

The defendant objected to the introduction of parol evidence as to the terms of hiring, and produced a bond given by him for the hire of Jack, which, he insisted, contained all the terms of hiring, and, therefore, could not be added to, or explained by parol, and which is as follows: "$115,00. On or before the 25th day of December, 1853, we promise to pay

to H. M. and Wm. M. Daughtry, executors of W. G. Daughtry, dec'd., or order, one hundred and fifteen dollars, for the hire of man Tony, boy Jack, and Charles; the said negroes are to be kept and returned on the 25th day of December, 1853; to have a good blanket each; and in event the said executors shall think proper to take the said negroes before the 25th of December, 1853, then, and in that case, they are to pay only in proportion to the time." Signed and sealed by defendant and another.

The objection was overruled, and the evidence admitted by the Court; for which the defendant excepted.

Verdict for the plaintiffs. Judgment and appeal.

Moore, for plaintiffs.
Heath, for defendant.

Battle, J. The cases of *Twidy* v. *Saunderson*, 9 Ire. Rep. 5, and *Manning* v. *Jones*, Bus. Rep. 368, recently decided in this Court, are similar in principle to the present, and must govern it. The contract of hiring was by parol, one term of which was that the boy Jack was not to be carried out of the County of Gates. The bond given afterwards by the defendant and his surety was not intended by the parties to reduce into writing all the terms of their contract, but mainly to secure to the owners of the slave the price which the hirer had agreed to pay, and to provide that if the owners, who were executors, should take the slave away before the end of the year, then the sum to be paid was to be in proportion to the time the hirer should have kept him. The giving the bond was subsequent to the contract, and was a part execution of of it. This makes the case different from that of *Pender* v. *Fobes*, 1 Dev. and Bat. 250, where, upon the sale of a vessel, which was evidenced by a bill of sale, in which was contained a warranty of title only, the plaintiff was not permitted to prove by parol an additional warranty of soundness. There the parties intended that the bill of sale should be the evidence of the contract of sale between them. Of course, no

additional term should have been permitted to be added by parol testimony. But would the result have been the same, had the sale been by parol, and the defendant given his note or bond to secure the payment of the purchase money? The note or bond might, or might not, have expressed that the consideration for which it was given was the purchase of a vessel; but no one would have expected to find there the payers, obligees or warranty, either of title or soundness. Suppose, at the time of hiring of a slave, a doubt should be expressed whether he was sound, and the owner should warrant his soundness, would the note or bond given to secure the price preclude the hirer from proving the warranty by parol, and thereby prevent his recovery for a breach? We think no one will contend for such a proposition, and yet it is the same in principle with the case before us. There is no error.

PER CURIAM. Judgment affirmed.

MALINDA FREEDLE *vs.* THE NORTH CAROLINA RAIL ROAD COMPANY.

Under the charter of the North Carolina Rail Road Company, only such benefits and advantages as are peculiar to the particular tract in question, and not such as are common to all the lands in the vicinity, are to be taken into the estimate, and the amount deducted from damages to land, taken for the use of the road.

PETITION for damages to land taken for the use of the rail-road, tried before PERSON, Judge, at the Fall Term, 1856, of Davidson Superior Court.

At the Fall Term, 1855, commissioners were appointed to ascertain and report what damages the petitioner had sustained by reason of the rail-road passing over her lands.

At the Spring Term, 1856, of that Court, the commissioners reported, "That in pursuance of the said order, they pro-

ceeded to view the premises, and after having taken into consideration all the disadvantages arising therefrom, as also the loss of land, the additional amount of fencing, which she is compelled to keep up in consequence thereof, and some other inconveniences, they arrived at the conclusion that she was damaged to the amount of one hundred and fifty dollars. And on the other hand, after taking into consideration all the advantages accruing to her by reason of the said road, as the increased facilities of getting to market, and particularly the enhanced value of her land, as a consequence, they have arrived at the conclusion, that she was benefitted to the amount of $250."

Upon the return of this report, the plaintiff's counsel moved the confirmation of so much of the report as allows her $150 for damage to her land, and excepted to so much as charges her with the value of $250 for benefits to her land.

On considering the plaintiff's exception, his Honor overruled the same, and confirmed the report.

Judgment for the defendants. Appeal by the plaintiff.

Moore and *Kittrell*, for plaintiff.
Miller and *Gilmer*, for defendants.

Pearson, J. Whether private property can be taken for public use without compensation, is a question that we are not called on to decide. There is no clause of our Constitution, or Bill of Rights, which expressly requires it. But the justice of making compensation is so obvious, that the omission of a clause requiring it, can only be accounted for upon the supposition, that it was taken for granted, that no act of such gross oppression would ever be perpetrated by the representatives of a free people. The laws of Athens prescribed no punishment for parricide, for it was taken for granted that no one would ever be guilty of a crime so horrid.

A decision of the question is not now called for, because the statute, under consideration, gives compensation, not only for the value of the land required for the purposes of the road,

but also damages for incidental injuries; and as it is said in the *Rail Road Co.* v. *Davis*, 2 Dev. and Bat. 461, "for the purposes of this cause, it may be assumed that compensation is in all cases requisite, as no doubt, in all cases, it will be made."

This is our question: According to the charter of the North Carolina Rail Road Company, is the compensation subject to a deduction by making an allowance for the general benefits of the road,—for instance, increased facilities for getting to market and travelling, increased prosperity of the country, stimulus to industry, more dense population, and a consequent appreciation in the value of real estate; in a few words, such benefits as are common to all? Or must the reduction be restricted to an allowance for such benefits only, as are *peculiar to the owner of the land*, a part of which is taken for the use of the road?

The words of the charter are satisfied by making a deduction for such benefits as are peculiar to the owner of the land; but they are broad enough to take in such benefits as are common to all. This raises a question of construction.

The rail-road company says to the owner of the land, "A part of your land is taken for the use of the public, but ample compensation is made to you; for in consequence of the increased facilities for getting to market and travelling, and the increased general prosperity of the country, the balance of your land is more than doubled in value, and you can sell it for twice as much as you could have got for the whole before, including the few acres taken by us." He replies, "That is true; but my neighbors can do the same with their land. These benefits are common to us all. We think the legislation, by which they have been secured to us, was wise, and we freely pay the additional tax made necessary thereby. But how is it, that in respect to myself, individually, these benefits are to be made use of for the purpose of paying me for a part of my land? I have a right to what is common to us all, without any such draw-back, and your talk about ample compensation is mockery, if my land is to be paid for in that way.

It would have been more ingenuous to have set out in your charter, in so many words, that the Legislature being satisfied of the fact that the increased value of the several tracts of land through which the road may pass, will be more than a just compensation for the land required for the road, no further compensation will be made. This would have saved me, and every one else, the expense of having commissioners to assess the damages."

To this the company cannot rejoin, otherwise than by asking a question: "If it was not the intention to take these general benefits into the calculation, why such a flourish of trumpets about benefit and advantage, that the owners of land may receive from the erection or establishment of the rail-road or other work, and the 'excess of loss and damage over and above the advantage and benefit, shall form the measure of the valuation of said land or right of way?'" What kind of benefits are to be considered? You surely will not treat all this as surplusage?

The owner replies, "If it was necessary to treat it as surplusage, or else to come to the conclusion, that the Legislature intended to take my land without making just compensation, and that what is said about compensation is a mere mockery, I would assuredly consider it more respectful to the Legislature, and more in accordance with the rules of construction, adopted by Courts of justice, to treat it as surplusage. In fact, it is a matter of common notoriety, that charters are procured to be drafted by interested individuals, and the strongest words in favor of the grantees are used, that it is supposed can be 'got through.' Hence the rule, that legislative grants and charters are taken most strongly against the grantees. But there is no occasion for rejecting this as surplusage, for, in many instances, the making of the road will be a direct benefit to the land, i. e., draining or saving fencing by reason of a deep cut; and it was proper while assessing damages for incidental matters, such as an injury to the spring, the additional fencing made necessary, and the inconvenience of having a field cut in two, and the crossing

places obstructed, that the advantages to the land should be taken into consideration, if there happened to be any peculiar benefit to it; and among these would probably be considered any *particular* increase in the value of the land; for instance, if a depot was located upon a tract of land, and some five acres taken for that purpose, leaving the owner the peculiar benefit of selling the adjoining lots at high prices; it may be that this would be taken into the account."

We are satisfied from "the reason of the thing" as indicated in the above dialogue, and from the further consideration that such general benefits and anticipated advantages, are too "contingent, uncertain and remote," to be made the basis of any practical rule, that the commissioners ought not to have taken into their estimate these benefits and advantages which *are common to all*, and that the proper construction of the charter confines the deduction to such benefits and advantages as are peculiar to the particular tract of land in each instance.

The researches of counsel have enabled them to meet with two cases in Massachusetts, both of which fully sustain our conclusion, *Meacham* v. *Fitchburg R. R. Co.*, 4 Cushing's Rep. 294, where, in construing a statute similar in its wording to the clause of the charter we have been considering, it is held "that a reduction of damages can only be made on account of some direct benefit, and not the uncertain and fanciful estimation of anticipated advantages which are common to other real estate owners in the vicinity, such benefit being too contingent, indirect and remote, to be brought into consideration in a question of damages to a particular parcel of land," and *Upton* v. *South Reading R. R. Co.*, 8 Cushing's Rep. 600. There, the ruling below was, "that the measure of damages was the depreciation of the market value of the tract of land by reason of the location of the rail-road, and that if the land was as valuable *in the market with the road*, by reason of the *benefits derived therefrom*, the petitioners were not entitled to recover any damages." Upon appeal, the decision was reversed, and the Court re-affirmed the construction

adopted in *Meacham* v. *Fitchburg R. R. Co.*, and the Court repeats, " benefits which are common to all the owners of real estate in the vicinity, such as the increased convenience of the people generally, the anticipated and probable effect upon the business and general prosperity of the neighborhood, and the consequent increase in the saleable value of real estate, are benefits too contingent, indirect and remote, to enter into the question of damages."

The judgment below is reversed The report of the commissioners set aside in respect to $250 assessed on account of benefit to the petitioners. Report confirmed in respect to $150 assessed for the value of the land and damages for disadvantages. Judgment for that sum.

PER CURIAM. Judgment reversed.

JOHN N. BLUM, GUARDIAN, *vs.* ZADOCK J. STAFFORD, *et. al.* ADMINISTRATORS.

One who has a *direct, certain, legal* interest in the event of a suit, is not a competent witness on the side of his own interest.

The interest which will disqualify a witness is any interest that can be asserted in a Court of justice, whether a common law Court or a Court of Equity.

ACTION of DEBT, tried before PERSON, J., at the Fall Term, 1856, of Forsyth Superior Court.

The action was brought against the defendants, as the administrators of Isaac Pitts, who, it was alleged, had become the surety of A. T. Pitts, in the bond sued on. The defendants pleaded *non est factum*, and resisted the recovery upon the ground that the signature of their intestate's name to the bond in question was a forgery.

On the trial, one *Gardner* was offered as a witness for the defendants, who was objected to, upon the ground of interest. It appeared that the proposed witness was the surety of A.

T. Pitts, in a note payable to one ———, and that he (A. T. Pitts,) had made a deed in trust, conveying his interest in the real estate descended from his father, (Isaac Pitts, the defendants' intestate,) for the benefit of the payee of this note, in common with many others of his creditors; and it was further shown that a recovery by the plaintiff in this case would exhaust the whole estate of Isaac Pitts, as well real as personal. The objection was overruled, and the witness was allowed to give evidence which was material to the issue.—Plaintiff excepted.

Miller, for plaintiff.
Gorrell and *Morehead*, for defendants.

Pearson, J. One who has a *direct*, *certain*, *legal* interest in the event of a suit, is not a competent witness on the side of his interest. By legal, is not meant only such interest as can be asserted in a common law Court, but it embraces any interest that can be asserted in any Court of justice. For instance, if one purchases a bond without endorsement, he has no such interest as can be enforced in a common law Court, but he has the beneficial interest, and is considered as the owner of the bond in a Court of Equity, and, consequently, has such a legal interest, or is so interested in the subject as to be incompetent. There is no difficulty about the rule, but the question is as to its application.

If there be a deed of trust to secure creditors, in an action against the trustee by a third person claiming the trust fund, one of the secured creditors is not a competent witness for the trustee, because he has a *direct*, *certain*, *legal* interest in the trust fund, and his interest will be affected by having it diminished. This is our case, with an expansion on both sides, but not so as to affect the principle in any degree. This action is not against the trustee, but it is against one who holds the fund for the trustee, and a recovery against whom will exhaust the fund, so as to leave nothing for the trustee. So, on the other side, a secured creditor is not called as a wit-

ness; but the person called is a surety upon a debt which is secured, who will be compelled to pay the debt if this fund is exhausted, and who is entitled, in Equity, to take the place of the secured creditor, and have the benefit of the trust fund; and so he is interested in preventing the fund from being exhausted or diminished.

This interest differs altogether from the interest of a child in his father's estate, who is living; or that of a creditor in the estate of his debtor, while the debt remains at large, or "in gross," i. e., before it is attached to any part of the estate. Herein is the distinction,—in the one case, the witness has no interest in the subject of the suit which can be enforced in a Court of justice; it is a mere expectancy; in the other, the interest of the witness has attached to the subject, so as to be entitled to the protection of the law. While a debt is merely personal, the creditor is a competent witness; but if the debtor attaches the debt to any article of his property, by a mortgage or deed of trust, then the creditor is not competent when his testimony will increase the fund or prevent it from being diminished. There is error. *Venire de novo.*

PER CURIAM. Judgment reversed.

STEPHEN PURVIS *vs.* ROYAL ROBINSON AND CO.

A petitioner under the 4th sec. of 58th chapter of the Revised Statutes, (for the relief of insolvent debtors,) is entitled to insist that suggestions of fraud, made by a creditor, shall be verified by the oath of the creditor and tried by a jury; and it is error in a Judge to decide upon such suggestions, without submitting them in an issue to a jury.

PETITION of an insolvent debtor to be discharged, heard before BAILEY, Judge, at the Spring Term, 1855, of Sampson Superior Court.

The petitioner was arrested on a ca. sa., at the suit of Royal

Robinson & Co., returnable to August Term, 1853, of the County Court of Sampson. He was imprisoned under this process, and while thus in close custody, filed this petition for his release, accompanied with a schedule.

The defendants, Royal Robinson & Co., opposed petitioner's application, and made objections to the schedule, which were overruled. The County Court, deciding that they could only impeach the schedule for fraud by making up an issue, ruled that the petitioner was entitled to take the oath of insolvency and be discharged from custody, from which judgment, the said Royal Robinson & Co. appealed to the Superior Court, where petitioner moved to be discharged, on the ground that no issue had been made up, and no suggestions of fraud sworn to; but his Honor decided that there was no necessity for issues in this case, and no necessity for any suggestions of fraud verified by the creditor's oath, and he proceeded to hear the application. Testimony was produced on both sides, but the Court refused the motion to discharge the petitioner, and ordered him into close prison until he should make a full and fair disclosure, or be otherwise discharged; from which judgment petitioner appealed.

Shepherd, for petitioner.
No counsel for defendants.

Nash, C. J. The petitioner, claiming to be an insolvent debtor, has filed his petition to be released from imprisonment, under the provisions of the 4th section of the act of 1836. See Rev. Stat., ch. 58. In the County Court issues were ordered to be made up to try the facts involved in the case, and which were in contest between the parties. From this order the defendant appealed to the Superior Court, where the presiding Judge, being of opinion that, under the act of 1836, there was no necessity for issues, proceeded himself to hear and decide the facts alleged on each side. In this there is error. His Honor was, no doubt, misled by the use of the word *summary* in the section of the act referred to; supposing it

to mean that the *Court* should try and decide the facts forthwith. In the case of *Whitley* v. *Gaylord*, 3 Jones' Rep. 286, the term received a judicial construction, fixing its legal meaning. The proceedings in that case were upon a motion for judgment upon a bond to keep within the prison bounds. The defendant insisted that the case should go to the jury; of which opinion was the Court; the plaintiff contending, that as the judgment was a summary one, the Court should try the facts. The plaintiff appealed to this Court, and the judgment was affirmed. In the opinion, the Court say, "the words of the act are satisfied by supposing the intention to be to avoid the delay incident to the proceedings in an ordinary action, by dispensing with formal process and pleadings, and having a summary trial upon the fact about which the parties differ."

This is an authoritative decision as to the meaning of the words *summary judgment*, as used in the act under which the proceedings were had. In another part of the opinion, in speaking of the common law on the subject, and the alterations produced by the act, it is said, "We can see nothing in the act indicating it to be the intention of the Legislature to make so radical a change in the law as to take from the parties the right to have the issues tried by a jury."

The facts in this case ought to have been submitted to a jury.

It is, however, said that the issues ought to have been made up in the County Court, and could not be made up in the Superior Court. In this position we do not concur. An appeal from the County to the Superior Court takes up the whole case, and it is to be tried there *de novo*. And such is the case where an interlocutory order disposes of the case. Otherwise, when such is not the case. *Russell* v. *Saunders*, 3 Jones' Rep. 432; *Shoffner* v. *Fogleman*, Busb. 280; *Johnson* v. *Sikes*, (ante 70). So many cases decide this principle that it is not an open question. For this error the judgment is reversed, and this opinion is to be certified to Sampson Superior Court.

PER CURIAM. Judgment reversed.

GEORGE W. PARSONS *vs.* WILLOUGHBY McBRIDE.

Every Court has the power to amend its own records, so as to make them conformable to the truth.

Motion to amend a record, heard before Bailey, J., at the Fall Term, 1856, of Currituck Superior Court.

The motion was first made in the County Court of Currituck, (on a notice to the defendant,) to supply a lost record. It appeared that a petition had been filed in the County Court of Currituck for a partition of the lands of Caleb T. Wilson, dec'd.; that an order had been made on said petition for the appointment of commissioners, who made a report to August term, 1820, of said Court, under their hands and seals, stating the partition and appropriation among the heirs of the said Caleb, of his real estate; and that the said report and appropriation had been lost from among the records of the said Court. A copy of this paper was produced and proved to the satisfaction of the Court, whereupon, the Court allowed the amendment asked, to wit, that the copy produced be filed in the cause as a part of the proceedings thereof; and that the order of confirmation be also amended, so as to read, "Report made and confirmed, and ordered to be certified, enrolled and registered, and that the same be so endorsed on the amended record;" from which order the defendant appealed to the Superior Court.

In the Superior Court the motion to amend was allowed, and the defendant appealed to this Court.

It was urged by the defendant's counsel here, that it did not appear that the plaintiff had any interest in the question, and, therefore, had no right to make the motion to amend.

Smith and *Pool*, for plaintiff.
Heath, for defendant.

Nash, C. J. So many decisions have been made by this

Court affirming the power of every Court to amend its own records, so as to make them conformable to the truth, that we had hoped that the question was at rest. The more recent cases are the following: *Clayton* v. *Liverman*, 7 Ire. Rep. 92, made in 1846; *Bradhurst* v. *Pearson*, 10 Ire. Rep. 55, made in 1849. In this case it is said, "It has been repeatedly decided that every Court has the power to amend its own records, so as to make them speak the truth, and that we have no right to interfere with the use of their discretionary power." *Green* v. *Cole*, 13 Ire. Rep. 425, in 1852; *Freeman* v. *Moses*, Bus. Rep. 287, in 1853. An exception to the general rule is established by the latter, which is, where the amendment is denied upon the ground that the Court has not power to grant it; there, if the power to act is possessed, and the refusal to act is upon that ground, it is error in law, and this Court will interfere.

It was objected that the plaintiff had no interest in the matter. This is unimportant.

It was brought to the notice of the Court that one of its records, or an important part of it, was lost. The Court has the power, *ex mero motu*, upon being satisfied of the fact, to allow the copy to be filed. *County Court* v. *Bissell*, 2 Jones' Rep. 387.

PER CURIAM. Judgment affirmed.

STATE *vs.* WILLIAM PRIVETT.

Where the agent of one indicted for trading with a slave, swore that he had general instruction from his principal not to traffic with slaves without a written permit, it was *Held*, that although this, if true, threw the *onus* upon the State of further proof of defendant's guilt, yet it was not error in the Judge to leave the enquiries to the jury whether these instructions had been abrogated, and whether the defendant had specially approved of the act.

State *v.* Privett.

INDICTMENT for unlawfully trading with a slave, tried before MANLY, J., at the Spring Term, 1856, of Wayne Superior Court.

Upon the trial below, it was proved that a clerk of the defendant had furnished the spirits to the slave in the absence of the defendant.

The clerk was sworn for the defendant, and stated that he had instructions from the defendant not to sell at any time to a slave without a written order.

In the argument of the case below, it was contended, on behalf of the State, that such general instructions as those testified to by the defendant's clerk, were not sufficient to rebut the presumption of approval by the principal raised by the statute.

On the other hand, it was contended by the defendant's counsel, that such instructions would rebut the presumption and throw upon the State the burthen of showing that the sale in question was an exception to these general instructions, and was specially approved by the defendant.

In reference to this contested point, his Honor instructed the jury "that general instructions would do, if unreversed and unexceptionable in their nature; that such instructions might be abrogated expressly, or by a course of practice to the contrary, or by a special approval; but that, unless there were some such reversal, the instruction sworn to by the witness would exempt the defendant from responsibility." Defendant excepted to the charge.

The credibility of the witness proving the instructions was left to the jury.

There was a verdict of guilty. Judgment and appeal by the defendant.

Bailey, (Attorney General,) for the State.
Wm. A. Wright, for defendant.

NASH, C. J. The defendant has, we think, no cause to complain of his Honor's charge. It was as favorable to him

as it could have been. The indictment is for a violation of the 90th section of the 34th chapter of the Revised Code, for selling spirituous liquor to a slave without a written permission from his owner, or some person having authority to give it. The trading is not denied; but the defense is, that the liquor was sold by the clerk of the defendant contrary to his orders. The clerk swore that he had instructions from the defendant not to sell, at any time, to a slave without a written order. By the 90th section of the act referred to, it is enacted that "Every species of unlawful trading with a slave, which is forbidden by this chapter, shall, when done by the agent or manager of another in the course of the business in which he is employed, be deemed to have been done by the consent and command of his principal or employer, unless the contrary shall be proved," &c. His Honor, the presiding Judge, directed the jury that the general instructions alleged to have been given by the defendant to his agent, the clerk, would be sufficient to rebut the presumption raised by the act if unreversed and unexceptionable in their nature; that such instructions might be abrogated expressly, or by a course of practice to the contrary, or by a special approval; but unless there was some such reversal, the instructions sworn to by the witness, would exempt the defendant from personal responsibility, and left the credibility of the witness to the jury. This was equivalent to saying to them—if you believe the witness, the defendant is, in law, not guilty. We repeat, we do not perceive the ground upon which the defendant can complain. In the argument below, the State contended that these general instructions would not rebut the presumption raised by the law; on the contrary, the defendant contended that the evidence of the clerk rebutted that presumption, and threw upon the State the *onus* of showing that they were ever abrogated by the defendant. It will be perceived that the defense rested upon the testimony of the clerk, and the jury have, by their verdict, said that they did not believe him, and, therefore, the defense was not, in the language of the act, proved; that is, the jury did not

believe the general instructions had been given, or if given, they were not in good faith.

The charge adopts the view taken by the defence—that the burden lay upon the State to prove that the general instructions had been abrogated by the defendant, in one of the modes specified; the last of which was a special approval. It is a rule of evidence, that where testimony to prove a particular fact is peculiarly within the possession or power of one of the parties, and is withheld from the jury, the presumption is, that if produced, it would operate against the party withholding it. This rule is sustained by the plainest principle of right reason. No one will hold back testimony important to his interest. In this case, the confidential relation in which the defendant and his clerk stood towards each other—the many hours in which there was no earthly eye to see them—no ear to hear them, precludes the State from producing any direct and positive proof of a subsequent approval of the act of selling the spirits to the slave. Not so with the defendant. Here was his clerk, his agent, the only person who could rebut by his testimony, the effect of the general order. Why was not he interrogated as to the fact of defendant's subsequent disapproval of the act, or the subsequent abrogation of the order? Again, what became of the price for which the spirits were sold? The clerk was selling the property of the defendant, in the course of the business for which he was employed. Is it not reasonable, in the absence of all proof to the contrary, to suppose that it went into the funds of the defendant? But it was in the power of the defendant, without relying on his faithless agent, to prove that he did disapprove of the act of selling to the slave in the manner stated, either by returning the price of the spirits to his master, or by discharging his clerk. Neither of which was done by him. The jury, therefore, even if they believed the witness as to the general orders, were well justified in further believing that they were subsequently abrogated, or the act of selling subsequently approved by the defendant, by his appropriating to

his own use the price of the spirits. 3 vol. Stephens' N. P., 2340; *Patton* v. *Brittain*, 10 Ire. Rep. 8.

As to the effect of general instructions in such a case as this, it is not necessary for us to give an opinion. But we can say, that if they are to have the effect given to them by the charge in this case, and in the argument of the defendant's counsel, the act under which this prosecution is had, will be very easily evaded.

PER CURIAM. Judgment affirmed.

LAWS & PALMER *vs.* W, H. THOMPSON, EX'R.

The claim which a purchaser at sheriff's sale has against the defendant in an execution, on account of a defective title, is but a simple contract debt, and an executor who pays such a claim in preference to a judgment creditor, is guilty of a *devastavit.*

A purchaser at sheriff's sale, who gets a defective title, has no right to take the place of the creditor by substitution, and thus bring to his aid the dignity of such creditor's debt.

Equity never interferes against creditors.

APPEAL from the County Court, tried before PERSON, Judge, at the Fall Term, 1856, of Orange Superior Court.

The plaintiffs were judgment creditors of Porter Thompson, and after his death, sued out a warrant upon their judgment against the defendant, his executor, and obtained judgment for their debt; but the defendant suggesting a want of assets on the trial before the magistrate, the case was sent to the County Court to try that question. The issue was submitted to a jury in the County Court, who gave a verdict for the plaintiffs, from which the defendant appealed to the Superior Court.

In the Superior Court it was referred to the clerk to state an account of the defendant's administration, which he did, and on the coming in of his report, various exceptions were filed

by the plaintiffs' counsel, all of which were overruled, except the fifth, which was founded on the following facts: The defendant produced to the commissioner, as vouchers, two judgments, in favor of A. Borland, amounting to $125,90. The plaintiffs excepted, and proved that the sheriff had paid the money on these judgments into Court; also, that a surplus of $149,21, arose on the sale of certain property, which the sheriff paid into the hands of the defendant as executor, and both the payment to Borland, and this sum of $149,21, are sought to be charged against the defendant. Borland's executions, on these judgments, had been levied on a tract of land, as the property of Porter Thompson, which was sold to one Latimer, under a *venditioni exponas* based on these levies, and brought $290; of this money, the sheriff paid $125,90 into Court, which the clerk paid to Borland, and the remainder, to wit, $149,21, he paid to the defendant. Subsequently, it was discovered that Porter Thompson had no title to the land sold by the sheriff, and Latimer demanded that his money should be refunded by the defendant as executor, which, under advice of counsel, he did, to wit, the $290, paid by Latimer to the sheriff. Whereupon, the defendant insists, that, as he was liable, in law, to Latimer, and could have been compelled to pay back to him the money he had paid for this defective title, he might do so without suit; that what he did, amounted to a rescission of the sale, and therefore, in law, the Borland debt was paid by him.

The plaintiffs contended, that Latimer's claim for his money was only a simple contract debt, and that as their's was of a higher dignity, it had the preference over Latimer's; of which opinion was his Honor, who sustained the exception, and the defendant appealed.

Bailey and *Fowle*, for plaintiffs.
Graham, for defendant.

Pearson, J. Prior to the Act of 1807, Rev. Code, ch. 45, sec. 27, a purchaser at execution sale, had no remedy, either

in Law or Equity, if he lost the property by reason of a defect in the title of the defendant in the execution. The officer sold only the interest of the debtor, and the purchaser bid for it at his own risk. There was no warranty, expressed or implied.

The Act referred to, gives the purchaser a remedy by an action on the case against the defendant in the execution, in which he may recover the amount of the purchase money with interest. There is nothing, however, in the statute which puts this "chose in action" above the dignity of a simple contract debt.

We consequently concur in opinion with his Honor in the Court below, that, as against these plaintiffs, the defendant was chargeable with the sum of $149,21, being the excess of the purchase money, after deducting the amount of the executions under which the sale was made, which sum was paid to him by the sheriff, and that the judgments in favor of Borland, which had been paid off by the proceeds of the sale, were not vouchers for the defendant.

In respect to the $149,21, that amount was received by the defendant as executor, for, and on account of, the estate of his testator, and, except by force of the statute above referred to, the purchaser could not compel him to repay it; so its repayment was an attempt on the part of the defendant to give the purchaser a preference over creditors of a higher dignity, and amounted to a *devastavit*.

In respect to the judgments in favor of Borland, they were satisfied, and extinguished by the money made at the execution sale, notwithstanding the defect in the title of the property sold (*Halcombe* v. *Loudermilk*, 3 Jones' Rep. 491) and being thus satisfied, could not afterwards be made use of by the defendant, although he had refunded the money to the purchaser.

It was said, in the argument, that under the doctrine of substitution, the purchaser might have taken the place of the judgment creditor, and compelled the defendant to pay the amount, and the defendant was at liberty to do, without suit,

what he could have been compelled to do. This is an application of the doctrine of substitution which is not sustained by any authority. *Scott* v. *Dunn*, 1 Dev. and Bat. Eq. 425, does not support it. There the land was *liable for the debt*, and the heir took back the land; it was held that the purchaser ought to be substituted in place of the creditor, so as to have a lien on the land in the hands of the heir; because, by paying the creditor, he had *relieved the land* to that amount. So there is no analogy.

The reason of the thing does not bring a purchaser at sheriff's sale within the principle of substitution. There is no kind of privity between him and the creditor. He buys the interest of the debtor, in the property sold, without warranty, at his own risk, and for his own gain. If the title is good, well; if it is not good, what is there to entitle him to take the place of the creditor? But suppose, as between him and the debtor in the execution, or his personal representative, the doctrine of substitution did apply, (if it does, it is singular that some case prior to 1807 cannot be found,) the aid of that doctrine is here invoked *against creditors*. It is well settled that Equity never interferes against creditors; for instance, if a surety on a bond pays the amount, although Equity will substitute him to the creditor, so as to give him the benefit of all securities, it will not put him in the situation of a specialty creditor, so as, by substitution, to enable him to divide the fund with specialty creditors; because, that would be interfering against creditors. Here the attempt is to give the simple contract creditor priority over judgment creditors.

PER CURIAM. Decree below affirmed.

THE STATE *vs.* HARLOW DIBBLE *et al.*

The Legislature having by various Acts declared the Neuse river, between certain points, a navigable stream, it is a nuisance to build a bridge across

the same between these points, so as to prevent the passage of boats; and such nuisance may be abated by any one.

There is no authority given by the Legislature to County Courts to build bridges over navigable streams, without making draws so as to admit the passage of boats and other craft navigating such streams.

INDICTMENT for obstructing a public highway, tried before BAILEY, Judge, at the Spring Term, 1855, of Johnston Superior Court.

The indictment was for removing part of a public bridge over Neuse river.

It appeared on the trial, that there was a public road leading from Smithfield to Wellon's cross roads, passing across the river Neuse a few miles below Smithfield; that at the place of crossing, the County Court of Johnston had erected a public bridge, which constituted a part of such highway, and was free to all the citizens of the State to pass, &c., and had been kept up by said County Court, and so used by the citizens for —— years; that the river Neuse is navigable for flat boats and small steam-boats, to a point above Smithfield, for about eight months in the year; that the defendants were the owners of a steam-boat running, as the state of the water would permit, between the town of Newbern, a port on the said river, and the town of Smithfield; that on the day named in the bill of indictment, defendants' boat, loaded with goods, to be delivered at Smithfield, reached the said bridge, and finding that it could not pass further up the stream, without removing a part of the bridge, the defendants did remove a part thereof, and it remained in that condition for several days, during which time, no persons could pass along the said highway, over the said bridge; that the bridge had a draw in it, but it required a greater force to raise it, than the crew of the boat afforded, and there were no hands provided by the County Court to raise the draw when necessary; that this draw was in such condition as to make it dangerous to raise it at all.

Upon these facts, his Honor instructed the jury, that the

defendants were, in law, guilty of the nuisance with which they were charged. The defendants excepted.

Verdict for the State. Judgment and appeal.

Bryan, with whom was *Bailey*, (Attorney General) for the plaintiff, argued as follows:

The Legislature of the State, prima facie, has the power of a sovereign, and among the acknowledged and most useful powers of sovereignty is that of establishing and constructing roads and bridges. Without proper internal communications, the prosperity of a State must be greatly retarded. 2 Gray's Rep. 32; 4 Pick. 460; 13 How. 581. The Legislature may authorise a bridge, or even a dam, across a navigable river, unless it conflict with the power of Congress to regulate commerce, &c. *Wilson* v. *Blackbird Creek Co.*, 2 Peters (Supm. Court U. S.) 245.

Here there is no act of Congress which has any application to this case. The Neuse is an internal stream; it is not a highway between the ports of different States, nor between ports of the same State. If Smithfield were a port established by act of Congress, then the erection of this bridge would impede commerce, and would conflict with the powers of Congress, by which the commerce between the port of Newbern and that of Smithfield would be legalised and protected.

The authority of Congress, if applicable to this river, has never yet been exercised; it still lies dormant, and, until exercised, the sovereign power of the State is not excluded. *Pennsylvania* v. *Wheeling Bridge Company*, 13 How. 581; 18 How. 430–2.

The County Court acts in regard to the erection of bridges, as the agent of the Legislature, exercising a delegated power, and not as the grantee of a franchise, and, therefore, the construction should be liberal in favor of its acts. It is not the case of a contract between the State and the County Court, in which case a strict construction would obtain as in the case of Charles River Bridge Company, 11 Peters' Supm. Court U. S.

Reps. The Legislature, therefore, can, at any time, repeal, modify or restrict the powers of the County Courts, according as the public exigencies may require. This power they have subsequently exercised by requiring draws to be made in the bridges where necessary, Rev. Code, ch. 101, sec. 34.

Miller, for defendants.

Battle, J. The first question which arises on the bill of exceptions filed by the defendants, is whether the Neuse river was a navigable stream at the place where the alleged offence was committed.

It is now well settled that the rule adopted in England by which navigable waters are distinguished from others, to wit, the ebb and flow of the tides, is entirely inapplicable to our situation, and, therefore, has been abrogated. *Wilson* v. *Forbes*, 2 Dev. Rep. 30; *Collins* v. *Benbury*, 3 Ire. Rep. 277; S. C., 5 Ire. Rep. 118; *Fagan* v. *Armstead*, 11 Ire. Rep. 433. No precise criterion for determining the question in this State has, as yet, been established by our Courts. In *Wilson* v. *Forbes*, Henderson, J., said, "What general rule shall be adopted, this case does not require me to determine, were I competent to it. But I think it must be admitted that a creek or river, such as this appears to be, wide and deep enough for sea-vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean, and the limit of whose waters is not higher, nor as high, as the flowing of the tides upon our sea-coasts, is a navigable stream within the general rule." In *Collins* v. *Benbury*, as reported in 3rd Ire., Ruffin, C. J., said, "Any waters which are sufficient in fact to afford a common passage for all people in sea-vessels, are to be taken as navigable." We are not aware that any more precise rule has been elsewhere laid down.

Whether the river Neuse, between the port of Newbern, in Craven County, and the town of Smithfield, in Johnston County, which is stated to be navigable, for eight months in the year, for flat-boats and small steam-boats, comes within the

terms of this rule; or whether the rule can be extended by analogy to embrace it, we need not enquire. The Legislature has the undoubted right to declare it to be a navigable stream, and, we think, that has been done, either directly or inferentially, by the following acts: First, the act of 1812, (ch. 849 of the Rev. of 1820,) entitled an act for the opening and improving the navigation of Neuse river, created a company for that purpose, and, in the 4th section, gave it power "to contract for the opening and improving, or otherwise cause to be opened and improved, the navigation of Neuse river, from the present head of boat navigation therein below Lockhart's Falls, westward to Crabtree Falls," &c. Secondly: By the 5th sec. of 103rd chapter of the Revised Statutes, taken from the act of 1823, (ch. 1197 of Taylor's Rev.) the justices of the several County Courts of Johnston, Wayne, Lenoir and Craven, were authorised to lay off the inhabitants on both sides of the river Neuse, above Spring Garden, into convenient districts, with the view of removing "all brush and other obstructions to the navigation" of that river.

Thirdly: The act of 1848, ch. 82, sec. 51, appropriated forty thousand dollars "for the purpose of cleaning out and improving the navigation of the river Neuse, between the town of Newbern and the town of Smithfield."

Fourthly and lastly: The act of 1850, chapter 112, after reciting the appropriation made in the preceding act of 1848, created the company styled the "'Neuse River Navigation Company,' for the more full and complete accomplishment of the object of effecting a more certain navigation of the river Neuse, between the town of Newbern, in the County of Craven, and Watson's landing, above Smithfield, in the County of Johnston."

The Neuse river having been thus recognised as a navigable water, the defendants had the right, in common with all other citizens, to navigate it with their boats, and, as an incident to such right, to remove all obstructions not put there by or under the sovereign power. It is admitted that the sovereign power in the present case, is the General

Assembly of the State. It would have been the general government, had the Congress of the United States passed any act relating to the river Neuse in execution of the power "to regulate commerce with foreign nations, and among the several States." Con. of U. S., Art. 1, sec. 8. *Wilson* v. *Black Bird Creek Marsh Company*, 2 Peters' 248; (8 Curtis 105.)

This raises, upon the record, the second main question in the cause—whether the bridge, for the removal of which the defendants are indicted, was erected and kept in the condition in which the defendants found it, by, or under, the authority of the General Assembly of the State.

In the argument of this question, the counsel for the State contended, that the Legislature had full power to authorise the erection of a bridge over any part of the river Neuse, either by a direct act of legislation, or by conferring the power to do so on the County Courts of the respective Counties through which the river runs; that, by the 22nd section of the 104th chapter of the Revised Statutes, taken from the Act of 1784, (ch. 227 of the Rev. of 1820,) the power was conferred upon the County Courts; that the County Court of Johnston, under the authority thus conferred upon it, did cause the bridge in question to be erected, and that, therefore, it was not a nuisance which the defendants had a right to abate.

The counsel further contends, that the 28th section of the same chapter of the Revised Statutes, taken from the Act of 1806, (ch. 706 of the Rev. of 1820,) applies only to toll bridges erected by owners of ferries, and that the draws which such owners are commanded to put in their bridges are not required in those erected by the County Courts under the former law. From an examination of the provisions of the acts referred to, whether in their original state, or as revised in the revisal of 1836, we are satisfied that the County Courts were not authorised by the 22nd section of the 104th ch. of the Revised Statutes, (which is the 5th section of the Act of 1784,) to build bridges over large and navigable streams. It is clear that small streams only were intended by that sec-

tion—streams, though small, yet too large to be bridged by the overseers and their assistants, and, therefore, requiring the aid of the County funds.

This will be made manifest by a reference to the 4th and 7th sections of the same Act of 1784, which form the 14th and 26th sections of the 104th chapter of the Revised Statutes. By the last clause of the 4th section it is evidently made the duty of the overseers of the public roads to build all "necessary bridges through swamps and over small rivers, creeks, or streams." The 7th section authorises the majority of the justices of the County Courts, "through whose Counties run large water-courses or creeks, across which, from the rapidity of the water and the width of the stream, it may be too burdensome to build bridges and keep them in repair by a tax on the inhabitants, if they deem it necessary, to contract with builders to build toll-bridges or expensive causeways; for each of which each Court is hereby authorised and required to lay the toll on all persons, horses, carriages and cattle, passing over the same," &c. These two sections provided for bridges over small and large water-courses, leaving it to the 5th to declare how and by whom those of an intermediate size should be bridged, to wit, by the County Courts, at the expense of the several Counties. The act of 1806 applied, no doubt, as the counsel for the State contends, to the bridges authorised by the Legislature, to be built by the owners of ferries, and to none others. As the law stood then, under legislative enactments, bridges over small rivers, creeks or streams, were to be built by the overseers of the public roads, with their assistants; those over rivers, or creeks, too large for the means of the overseers and their assistants, were to be built by the County Courts of the Counties through which they run, at the expense of the Counties; those over wide and rapid streams were to be erected as toll-bridges, under the order of the County Courts, by contractors, if a majority of the justices should deem it necessary; while toll-bridges might be built at ferries by the owners thereof. Of these different kinds of bridges, the last only were expressly required to have

a draw to admit of the passage of vessels through them. In the revisal of 1836, the enactments to which we have referred were brought together, and, with other provisions, were incorporated into one act, entitled, "An Act concerning the public roads, ferries and bridges, in this State," and forms the 104th chapter of the Revised Statutes. By this incorporation, words and phrases, though generally retaining the sense in which they were used in the acts from which they were taken, acquire sometimes, necessarily, a diferent meaning. Thus a clause, which in the old act was, by its terms, confined to that, may, when employed in a revised statute, be extended, by the use of the same terms, into a wider signification. Among the clauses thus extended in their application, is the last in 28th section of the revised statute above referred to, which comes in under a proviso, and is in the following words: "In all such bridges, the proprietors shall erect a draw, where any water-course is frequently and commonly used by sea-vessels, or masted boats, of considerable burthen." This proviso was, doubtless, in the act of 1806, confined to the owners of ferries, who had erected toll-bridges instead thereof. By a literal construction, it might seem to be confined to them in the revised statute, but as there is manifestly the same necessity for draws in the toll-bridges to be erected by contractors under the order of the County Court, we think it was the intention of the Legislature that it should embrace both. It is a fair case for the application of the maxim, *qui hæret in litera hæret in cortice.* Our opinion, then, is that all toll-bridges over navigable streams, whether built by owners of ferries or by contractors with the justices of the County Courts, must have proper and sufficient draws in them, and that the proprietors must keep the draws in good repair, so that they may always answer the purposes of their erection whenever the exigencies of navigation may require it.

But it is said by the counsel for the State, that the bridge now in question was not a toll-bridge at all; that it was built as a public bridge, under the authority of the County Court of

Johnston, and that, therefore, there was no necessity for it to have a draw at all. To this the reply is, that the power of the County Courts over the subject of bridges, is a special and restricted one. It is manifestly proper that it should be construed as a special authority with regard to bridges across navigable water-courses, otherwise the free exercise of the paramount rights of navigation might be very materially hindered and obstructed. From the review which we have made of our enactments on the subject, it is apparent that the County Courts have no authority, given in express terms, to erect, or cause to be erected, draws in a public bridge across a navigable stream. Their power to do so, is to be inferred from the act which authorises them, if they deem it necessary, to have toll-bridges built by contractors. If they do not deem it necessary to order the building of such bridges by contractors, they may do it themselves out of the County revenues; but in that case their bridges must, in favor of the right of navigation, have such draws as are prescribed for other bridges. Such seems to have been the opinion entertained by the justices of Johnston County Court of the extent of their power, when they erected the bridge which has given rise to this controversy. They had a draw fixed in it, but as they did not keep it in repair, the question arises whether it did not thereby become a nuisance which the defendants had a right to abate. That it did, the case of *Renwick* v. *Morris*, 3 Hill's (N. Y.) Rep. 621, is a strong authority. In that case it was decided, that where, under an act of the Legislature, giving to the defendants and their assigns, the right of erecting and maintaining a dam upon navigable waters, the dam was so built as to impede the navigation beyond what the act authorised, it became *pro tanto* a public nuisance, and liable to be abated by any person; and further, that the remedy by abatement was, in all respects, concurrent with that by indictment. The principle is, that any unauthorised obstruction in a navigable stream, by means of a bridge, or a dam of any kind, is a public nuisance which any person may abate, and if it be put there under the authority of the sovereign, it will be pro-

tected only so far, and so long, as it is confined within the limits of the authority. An analogous principle was laid down by this Court in the case of *Meares* v. *The Commissioners of Wilmington*, 9 Ire. Rep. 81, to wit, that a public or municipal corporation is liable for doing a work, which the law authorised to be done, if done in an unlawful and unskilful manner, so that an individual is injured thereby.

In the case which we have under consideration, if the bridge had been a toll-bridge, built by the owner of a ferry, under authority vested in him by law, or by a contractor, under the authority of the County Court, it would undoubtedly have become a nuisance, liable to abatement as soon as the draw had, from decay or want of repair, failed to answer its purpose. The special authority to build the bridge with a draw, and to keep the same in good order, would not have protected its owner longer than the terms of the authority were observed. So, a public bridge, built by the justices of the County Court, across a navigable water-course, must be subject to the same conditions and restrictions. As agents of the Legislature, the justices, sitting in Court, could do nothing beyond what their principal had authorised. They were not empowered to do anything which might impede the free navigation of Neuse river, and it followed, as a necessary consequence, that when their bridge became an obstruction to navigation, it was a nuisance which the defendants, or any other person, had a right to abate. See Angel on Tide waters, 115.

The judgment must be reversed, and a *venire de novo* awarded.

Per Curiam. Judgment reversed.

JOHN TURNER, TO THE USE OF MINNICK MILLER, *vs.* STEPHEN A. WHITE.

A suit was brought in the County Court and a bail-bond given for an appearance in that Court; there was an appeal and final judgment in the Supe-

rior Court; it was *Held* that a sci. fa., to charge the bail, could only be brought in the Superior Court.

In a sci. fa. to subject bail, it is sufficient to set out that there was a judgment, without stating the form of action in which it was obtained.

It is sufficient to allege, generally, in a sci. fa. against bail, that he became bound, as bail, at the time of the execution of the original writ, and liable by virtue of an Act of Assembly.

An inconsistent recital in a bail-bond as to who was the party plaintiff, may be rejected as surplusage where there is enough besides, on the face of the instrument, to show who really was the plaintiff.

So, where the bail-bond was assigned to A, "the plaintiff therein named," and the bond showed that the plaintiff was B, who sued to the use of A, it was *Held* that B was entitled to the remedy by sci. fa.

SCIRE FACIAS against bail, tried before his Honor, Judge MANLY, at a Special Term (June, 1856,) of Orange Superior Court. Pleas—"*nul tiel record*," "*non est factum*," "no assignment."

The sci. fa. was brought in the Superior Court of Orange, and is substantially as follows: "Whereas, John Turner, to the use of Minnick Miller, lately in our Superior Court of law, held, &c., by the judgment of the said Court, recovered against John A. Butler, a certain debt of $170, with interest, &c., and Stephen A. White, at the time of the execution of the original writ, in the above cause, became special bail, in the said suit, for the said John A. Butler, and liable, by virtue of an act of the General Assembly, to abide and perform the judgment of our said Court, or surrender the said principal into custody, in case he fail to do so in discharge of his said bail, which, hitherto in all things, both principal and bail have failed to do, as we have been informed; we, therefore, command you, that you make known to the said Stephen A. White, that he be, and appear, &c., to show cause, if he has any thing to say, why the said John Turner, to the use of Minnick Miller, ought not to have execution against him for the debt, damages and costs, &c."

The original suit, which was in the name of John Turner to the use of Minnick Miller against John A. Butler, was begun in the County Court of Orange and brought up by appeal;

and the judgment finally taken in the Superior Court.

The condition of the bail-bond, taken in the case, is as follows: "If the above-bounden, John A. Butler, who has been arrested by the said R. M. J., sheriff, as aforesaid, upon a writ returnable to the County Court of Orange, at the suit of *Minnick Miller*, does well and truly make his appearance at the next County Court, to be holden, &c., then and there to answer to the said *John Turner to the use of Minnick Miller*, to a plea that he render unto him the sum of $170, which he owes, and from him detains, to his damage $50, and then and there to stand to, and abide by, the judgment of the said Court, and not depart the said Court without leave, and the said Stephen A. White, the security of the said John A. Butler, well and truly discharge himself, as special bail, of the said John A. Butler, in the said Court, then the above obligation to be void, otherwise to remain in full force and effect."

To which is the following assignment: "I, Richard M. Jones, sheriff of the county of Orange, do hereby assign over the above obligation and condition to Minnick Miller, *the plaintiff therein named*, his executors and administrators, to sue for, and recover, agreeably to an act of Assembly, in such case made and provided. Given under my hand and seal, &c."

The defendant offered the following objections to the plaintiff's right to recover.

1. That the *sci. fa.* ought to have issued from the County Court, and not from the Superior Court.

2. The *sci. fa.* does not set out the form of the original action, nor does it show how the defendant became bound as bail.

3. The condition of the bond, offered in evidence, recites that Minnick Miller is the plaintiff in the suit.

4. That the condition of the bond is repugnant and void.

5. That the assignment of the condition of the bond is to Minnick Miller, and not to John Turner.

His Honor decided all these points in favor of the plaintiff, except the last, and as to that he permitted the sheriff of Orange, on motion of plaintiff, and on payment of all costs of

suit up to that time, to come in and amend his assignment. For all which, the defendant excepted.

The issues were found for the plaintiff. Judgment and appeal.

Bailey and *Turner*, for plaintiff.
Norwood, for the defendant.

Pearson, J. 1. The sci. fa. is based upon the judgment, and properly issued from the Superior Court, where final judgment was rendered. The judgment in the County Court was vacated by the appeal, and there was no record in that Court upon which to issue a sci. fa.

2. In this proceeding the form of the original action is immaterial. That matter is concluded by the judgment, and nothing behind it is open for enquiry. So, it is sufficient for the sci. fa. to set out the fact of there being a judgment, and the fact, that the defendant became bound, as bail, at the time of the execution of the original writ, and liable, by virtue of an act of the General Assembly, &c. This puts it in the power of the defendant to deny the existence of the judgment by the plea of "nul tiel record," and to deny his liability, as bail, by the plea of "non est factum." There can be no necessity for incumbering the record by a more detailed statement of the manner in which the defendant became liable as special bail; for there is only one way in which it could be done by virtue of the statute; that is, by the execution of a bond in double the sum for which the party was arrested; and we can see no objection to this general averment of the fact of the defendant's liability, as special bail, by force of the statute. In *Neal* v. *Hussey*, 3 Jones' Rep. 70, and *Malpass* v. *Fennell*, Ibid. 79, it is held, that in a sci. fa. to charge a sheriff, as special bail, it is sufficient to aver that he arrested the defendant and failed to take bail, whereby, &c.

3 and 4. The recital that Butler had been arrested, upon a writ, at *the suit of Minnick Miller*, is inconsistent with the wording of the condition, "does well and truly make his ap-

pearance, &c., then and there to answer *the said John Turner to the use of Minnick Miller*, of a plea, &c." But this recital may be rejected as surplusage under the maxims "*ut res magis valeat quam pereat*," and "*utile per inutile non vitiatur*," and enough will remain to identify the writ, under which Butler was arrested, as a writ in the name of John Turner to the use of Minnick Miller. See the cases of *Miller* v. *Cherry* (in Equity) and *State* v. *Harrell*, (ante 55,) decided at this term, where the distinction between averments in pleading and matter set out in deeds, bonds, &c., is discussed, and it is held that, in regard to the latter, a want of correspondence, where there are several descriptions, is not fatal, provided the identity of the subject can be fixed by such parts of the description as do correspond.

5. The same principle applies to the assignment, and relieves it from objection, by striking out "Minnick Miller" as surplusage. So that it will read, "hereby assign the above obligation and condition to the *plaintiff therein named*, his executors, &c., to sue for and recover, agreeably to the act of Assembly in such case," &c. The assignment, in these general terms, is sufficient. There is an apparent mistake by attempting too much particularity, for Minnick Miller is not "the plaintiff therein named," and this part of the description does not correspond, and it is to be rejected by the beneficent rules of construction above referred to, as enough appears without it. This inconsistency was obviously produced by a confusion of ideas, caused by the fact, that as Minnick Miller was the party beneficially interested, it was difficult to divest the mind of the impression, that he was the plaintiff, instead of John Turner, in whose name the action was brought for his use.

From this view of the case, it is seen that the assignment was sufficient without the amendment, which was allowed in the Court below, and it is unnecessary to consider the several points made in regard to it. There is no error.

PER CURIAM. Judgment affirmed.

JACOB KIMEL *vs.* ANDREW KIMEL *et. al.*

In an enquiry of damages arising from the ponding of water upon land, the plaintiff has a right to have the question submitted to the jury, whether the overflowing complained of was, during the time alleged, injurious; and any former benefits the land may have received from such overflowing, had nothing to do with the question.

PETITION for damages for ponding water upon plaintiff's land, tried before PERSON, J., at the Fall Term, 1856, of Davidson Superior Court.

The defendants were the owners of a mill, on Muddy Creek, and the plaintiff owned a tract of land on the same stream, a short distance above the mill.

The mill was built in 1843, and one Fisher then owned the land alleged to be injured, who, about the first of the year, 1853, sold it to the plaintiff. At the time of this sale, and during the year 1853, it was proved that a certain bottom belonging to the land was injured by the water of the defendants' mill-pond, and rendered thereby less productive than it would have been if the dam had been taken away.

For the defendants it was proved, that, in the year 1843, when the dam in question was erected, this bottom had several ponds on it of considerable size, which always held water, and that its general surface had been much lower than it was in 1853; that between the building of the mill, in 1843, and the date of the plaintiff's purchase, these ponds had been filled up, and the surface of this bottom elevated by the stagnation of the water of a small creek which formerly had run through it with a swift current; but by the backing of the water, and the frequent overflowing of this creek and of the mill-pond, an accumulation of sediment had taken place, and had thus raised the surface considerably higher and had filled up the ponds, and that this land, which had been worth from five to ten dollars per acre had been increased in value to from thirty to forty dollars per acre.

The plaintiff's counsel requested his Honor to instruct the

jury that, taking it for granted that the erection of the mill-dam had benefitted the land before the plaintiff became the owner of it, yet, that he had a right to the full enjoyment as it was when he bought it; and if the jury should believe that it was less valuable or productive as it was, than it would be if the dam was removed, the plaintiff would be entitled to damages. The Court refused to give such instructions, and the plaintiff excepted.

Verdict and judgment for defendants, and appeal by the plaintiff.

Miller, *Morehead* and *Gorrell*, for plaintiff.
No counsel for defendants.

Battle, J. At common law, the injury caused by the erection of a dam across a running stream, and ponding the water back upon the land of a proprietor above, was redressed by an action on the case. If the dam were continued, the action might be brought from time to time, until the defendants were compelled, by multiplication of the damages and costs, to remove the nuisance. It is certain that any incidental advantages that might accrue to the land overflowed from the continuance of the dam, would not defeat the action, however they might lessen the damages. If one person should, against the will of another, cart manure upon his field, the latter could recover damages for the trespass, although the field might be benefitted by the manure, and he might recover, at least, nominal damages from year to year, should the trespass be repeated, although the land might be made rich by the operation. The Act of 1809, embraced in the Revised Statutes, ch. 74, sec. 9, *et seq.*, (Rev. Code, ch. 71, sec. 8, *et seq.*,) which was passed in favor of mill owners, altered the remedy so far as the mode of proceeding to recover the damages and costs was concerned, but did not affect the principle of the right of action except in one particular: in the 15th section of the act, as contained in the Revised Statutes, (sec. 14, Rev. Code,) it is declared "that if the verdict of the jury be that the pe-

titioner has sustained no damage, then he shall pay the costs of the petition, &c." At common law he would have been entitled to a penny, at least, for it is assumed that the water was thrown upon his land by the dam of the defendants.

In the present case the instruction prayed on behalf of the petitioner, and refused by the Court, was founded upon the supposition that the defendants' dam was then doing some injury to his (petitioner's) land, as the water was ponded back upon it. We think that he had the right to have the question, whether, in fact, the land was then injured or not, passed upon by the jury. The inquiry whether his land had previously been improved in value by a nuisance, to the continuance of which neither he nor his vendor had ever assented, had nothing to do with his right of action at that time. The jury might, indeed, have found that he had not sustained any damage during the period to which his suit referred, and in that case he would have had to pay the costs of his petition; but he had the right to have the opinion of the jury upon that question, and we think his Honor erred in depriving him of it.

The judgment is reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

JEHU BROWN *vs.* ALLEN BROWN.

A provision in a bond to submit to certain arbitrators "the division and settlement of our father's estate," necessarily involves the inquiry, what constitutes that estate. An award, therefore, that a certain slave, claimed by the executor in his own right, should be sold, and the money distributed among all the parties to the submission, was within the scope of the submission, and was obligatory on the executor.

Parol evidence is not only admissible, but necessary to show what matters were acted on by the arbitrators.

THIS was an ACTION of COVENANT, tried before MANLY, J., at a Special Term (June, 1856,) of Orange Superior Court.

The instrument declared on is as follows: "Know all men by these presents, that we, John Brown, Wm. Brown, Allen Brown, Jehu Brown and Matthew Brown, are held and firmly bound, each to the other, in the sum of four thousand dollars," &c., (dated August, 1841.)

"The condition of the above obligation is such that, whereas, we have this day submitted to the arbitration and award of Catlett Campbell, Thomas Clancy and Stephen Moore, mutually chosen by us, the division and the settlement of the estate of William Brown, dec'd., our father, now in the hands of Allen Brown, executor, &c., between and amongst us, his legatees and heirs at law. Now if the said John Brown, William Brown, Allen Brown, Jehu Brown and Matthew Brown, shall stand to, and abide by, the division of, and settlement of, said estate amongst us, according to award made by said Catlett Campbell, Thomas Clancy and Stephen Moore, then the above obligation to be void, else, to remain in full force and virtue." Signed and sealed by the parties above named.

The arbitrators, on the 30th day of August, 1841, declared their award, which is as follows:

"Whereas, controversies have arisen between Allen Brown, executor of William Brown, dec'd., and his brothers, Matthew Brown, William Brown, Jehu Brown and John Brown, touching the settlement of the estate of their father, William Brown, dec'd.; and whereas, for putting an end to all such controversies, they, the aforesaid Allen Brown, John Brown, Matthew Brown, William Brown, jr., and Jehu Brown, by their bond, bearing date 20th August, 1841, are reciprocally bound, each to the other, in the penal sum of four thousand dollars, to stand to, abide by, and to perform such award and final determination, as the undersigned, Catlett Campbell, Thomas Clancy and Stephen Moore, arbitrators indifferently chosen by the parties, shall make in, and concerning, the premises. Now, therefore, know all men, that we, the said arbitrators, whose names are hereunto subscribed, and our

seals affixed, having taken upon ourselves the burthen of the said award, and having fully considered the proofs and allegations of both the said parties, and that there may be a final determination of all the said matters of controversy, do award and order that the said Allen Brown, executor, &c., pay to Matthew Brown, William Brown, John Brown and Jehu Brown, each, the sum of $244,47, with interest from the 1st day of January, 1841, and payable from and after the 1st day of January, 1842.

"We further award and direct that, at the death of Miss Polly Brison, a certain negro, by the name of Stephen, to be sold to the highest bidder for cash, and the proceeds of such sale to be equally divided among the five brothers, legatees of the said William Brown, dec'd., or their representatives," &c. Signed and sealed by the arbitrators.

The breach alleged was, that Polly Brison was dead, and that the defendant, Allen Brown, had refused to sell the slave, Stephen, as the award required him to do, and to pay the plaintiff his fifth part of the proceeds of the sale.

It was admitted that the defendant had performed the rest of the award, by paying to each of the other parties the sum of $244,47 awarded to them.

But the defendant contended that the slave, Stephen, had been conveyed by Wm. Brown, in his life-time, to Polly Brison, and by her to the defendant; and that, therefore, he constituted no part of the estate of Wm. Brown, dec'd., and was not embraced within the terms of the submission bond, and he produced a bill of sale from his father to the said Polly Brison, and another from the said Polly to him, the defendant, duly attested, &c., dated in 1839.

The deposition of Stephen Moore, the only survivor of the arbitrators, was offered by the plaintiff, and objected to by the defendant, but admitted by the Court; for which plaintiff excepted. The part thereof material to the issue, is as follows:

"I did act as such (arbitrator) in the said arbitration with Catlett Campbell and Thomas Clancy, and remember the con-

troversy in regard to the boy, Stephen, said to have been conveyed by William Brown, dec'd., to Miss Polly Brison, and by her to Allen Brown. The other brothers, to wit, John, &c., (naming them,) alleged that their father, at the time he conveyed the boy to Miss Polly Brison, was too weak in mind to transact business, and that he did not, at the time, intend to convey more than a life-time estate in the said Stephen, and that they were as much entitled to said boy, at the death of Miss Polly Brison, as Allen Brown, to whom it was alleged Miss Brison had conveyed him. We examined all the evidence brought before us with care and deliberation, both as to the dispute in regard to the said boy, as well as to all the matters in dispute in the settlement of Allen Brown, as executor, of his father's estate, and made an award on the whole."

His Honor instructed the jury upon the law in favor of the plaintiff. For this, defendant excepted.

Verdict and judgment for the plaintiff. Appeal by defendant.

Norwood and *Phillips*, for plaintiff.
Graham, for defendant.

Pearson, J. The object of the reference was to settle the estate of Wm. Brown, dec'd., and by a proper construction of the bond it extends to all matters and things for, and on account of which, the defendant was liable, as executor, and in which the parties, who were children of the testator, were interested. The negro man, Stephen, had belonged to the testator. It was contended on the one side, that he belonged to the testator at the time of his death, and constituted a part of his estate, for which the defendant was liable to account; on the other, it was contended that he did not belong to the testator at the time of his death, but had been transferred to one Polly Brison, who had transferred him to the defendant. Here was a matter of controversy, the settlement of which was necessary in order to settle the estate of the tes-

tator, and which constituted, in fact, a part of the settlement of the estate. We concur with his Honor in the opinion that the arbitrators did not exceed their powers.

There can be no doubt that the testimony of the witness Moore, was competent. Parol evidence is not only admissible, but necessary, in order to show what matters the arbitrators acted on. So, upon a plea of former judgment, how can it be told whether the cause of action was the same or not, without proof as to the subject of the former trial? There is no error.

PER CURIAM. Judgment affirmed.

Doe on dem. DOCTOR F. MANN *vs.* WILLIAM H. TAYLOR.

Where a case has been transmitted to this Court irregularly and improperly, and decided under the impression that it was here by the consent of parties, on its appearing to the Court, at the same term, that it was not so brought up by consent, the Court will order the judgment to be vacated and the cause stricken from the docket.

THIS was a motion to vacate a judgment rendered at this term of the Corut, and to strike the case from the docket.

The cause, which was an ACTION of EJECTMENT, was tried below, before his Honor, Judge CALDWELL, at the Spring Term, 1856, of Stanly Superior Court, and resulted in a verdict and judgment for the plaintiff, from which the defendant prayed an appeal to the Supreme Court, and filed an appeal-bond in the office of the clerk of that Court; but no bill of exceptions was prepared and tendered to the Judge trying the cause, for his signature, and no statement of the case made out by him in lieu of such exceptions.

At the next term of that Court, his Honor, Judge DICK, presiding, came one Daniel Freeman, and made an affidavit, stating that the defendant held under him, and that he was

the party beneficially interested in the land; stating, also, the facts of the trial, verdict, appeal and filing the bond, at Spring Term, 1856, and that the Judge had not filed a statement of the case as affiant had expected; that he had applied to the defendant's counsel to make out a statement as nearly as he could, of the case tried, which he had done, and which he believed to be substantially correct, and which he appended to the affidavit, also, setting forth some of the title papers under which the lessors of the plaintiff claimed title to the premises, to wit, a grant to Arthur Dobbs, and a copy of a deed from Stephen Kirk to Thomas J. Shinn. Upon consideration of which affidavit, his Honor ordered this record to be made in the case: "In this case, the affidavit being offered in open Court by the counsel for the defendant, and the counsel for the plaintiff being in Court, and appended to the said affidavit was a statement of the facts and trial of this cause, at March Term, 1856, in this Court, and thereto a copy of a deed from Stephen Kirk to Thomas J. Shinn; and it being made to appear to the Court that, at March Term, 1856, after the trial and verdict and judgment in this cause, an appeal was prayed by the defendant to the Supreme Court, and granted, and an appeal bond, with adequate surety, filed, and that no case had been made out and filed for the Supreme Court, and no transcript of the record was sent up to the Supreme Court, for the want of such case having been made out and filed, on motion, it is ordered by the Court, that the statement of facts of the case, and trial of the said action of ejectment, together with a copy of the grant to Arthur Dobbs, and a copy of the deed from Stephen Kirk to Thomas J. Shinn, be entered of record, *nunc pro tunc*, as of March Term, 1856."

At an early day of this term, the cause was taken up and argued for the defendant, no counsel appearing for the plaintiff in this Court, and decided upon the statement of facts sent up, in favor of the defendant.

Subsequently in the term, a motion was made to vacate the judgment aforesaid, and that the cause should be stricken from the docket, and affidavits of the counsel, who appealed for the

plaintiff in the Court below, were read, stating that they did not give their consent to the order made for bringing up the cause *nunc pro tunc*, nor to the transmission of the record from the Fall Term, instead of the Spring Term, 1856.

Boyden, for plaintiff.
Bryan, for defendant.

Pearson, J. When this case was decided and the opinion filed, the Court acted under the impression that the making up and filing "the case" *nunc pro tunc*, and the transmission of the record to this Court from Fall Term, 1856, instead of from the Spring Term, 1856, when the trial took place and the appeal was taken, was all done by *consent*, for the purpose of avoiding the difficulty in which the appellant was placed, by reason of the fact that the Judge before whom the case was tried, and under *whose direction* the statement of the case ought to have been made out, and by *whom* the bill of exceptions ought to have been signed and sealed, had not made out a statement of the case. Upon an affidavit now filed that the case was not transmitted to this Court from Fall Term, 1856, by consent, a motion was made by the counsel of the appellee to vacate the judgment which had been rendered at this Term, and to strike the case from the docket of this Court. The motion is allowed.

Thereupon, a motion was made by the counsel of the appellant for a *certiorari*, which motion is also allowed.

We do not think it proper now to express an opinion upon the question, whether any Judge except the Judge who presides at the trial, has power to sign and seal a bill of exceptions, or cause to be made up a statement of the case, which is allowed to answer the purpose of the bill of exceptions; or whether the "presiding Judge" has power to do so, except at the Term when the trial takes place.

Per Curiam. Judgment of this term vacated.

JACOB PROPST *vs* E. H. ROSEMAN.

For the executor of an estate to permit a slave bequeathed to a daughter to remain with her, at the late mansion of the deceased, for ten years, without himself ever assuming any control over the slave, is certainly some evidence of an assent.

There can be no parol agreement that a slave shall stand as a security for money, unless the property is delivered to the pledgee.

ACTION of DETINUE, tried before ELLIS, Judge, at the Spring Term, 1856, of Rowan Superior Court.

The declaration was for the detention of a female slave, named Sarah. The slave in question had been bequeathed to Lunda Roseman by her father, who died in the year 1843. Within that year the will was duly proved, and James C. Roseman, the executor therein named, qualified. At the time of the testator's death, Lunda, who was under age, lived at the family mansion with her mother and her brother, John, who is since dead. The slave, Sarah, never was taken possession of by the executor, but was permitted to remain at the home plantation, and worked in common with the slaves of the mother and brother, John, until the year 1850, when the plantation was sold, as the property of John, the brother, and bought by the defendant. Lunda had lived from the death of her father up to 1850, with her mother and brother John, on the said plantation, and afterwards, up to the year 1854, continued to reside there with the mother and the defendant. In that year she intermarried with the plaintiff, and went with her husband to his residence, taking nothing with her. After a short time, during the same year, she went on a visit to the house of the defendant, where she took sick and died. A demand was made for the slave, which was refused, and this suit was brought in August, 1854.

The defendant set up two grounds of defence,

1st. That there had been no assent to the legacy on the part of the executor.

2nd. That the wife of the plaintiff had pledged the slave as security to the brother for a debt.

To establish these positions, the defendant introduced James C. Roseman, the executor, who swore that he never had assented to the legacy, but that the negro had remained on the plantation, without any claim, on Lunda's part, until her death. In regard to the second ground of defense, he stated that after the death of John, the defendant was unwilling to board his sister Lunda, unless she would either pay, or secure her board to be paid; furthermore, that the defendant had paid two debts for his sister Lunda, amounting in all to about two hundred dollars, and it was agreed between the defendant and Lunda, that the slave, Sarah, should *stand as security* for the board and this sum of $200.

The Court instructed the jury as to the second ground of defense, that as there was no delivery to the defendant, or possession proved, this ground was not available. Defendant excepted.

As to the first ground of defense, if the jury should be of opinion that there was no assent of the executor they would find for the defendant; and, in making this inquiry, they would consider the long time during which the negro had remained on the plantation with the plaintiff's wife without claim or control on the part of the executor. Defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Osborne and *H. C. Jones*, for plaintiff.
Boyden and *Fleming*, for defendant.

Nash, C. J. The first point to be established by the plaintiff, to make a recovery of the slave sued for, is that the executor had assented to the legacy. There is no controversy as to the legacy. The defendant denies that the executor ever had assented, and the latter who was a witness, swore he never had assented. The father of Lunda Roseman, the deceased wife of the plaintiff, by his will, gave her the negro in question, and died in 1843. After the death of her father,

Lunda continued to live with her mother and a brother, and the negro remained on the farm and worked with the other hands for the support of the family. When the brother died, the land on which Lunda and her mother lived was sold, and the defendant purchased it, and removed there, where he and his mother and Lunda continued to live up to the time of her marriage in 1854. After the marriage of the plaintiff and Lunda they removed to his house, and she died the year following. The writ was issued in 1854. The executor never took the slave into his possession, and never exercised any control over her. Upon this part of the case the jury were instructed, that the long time the negro remained in the possession of the legatee, without claim or control of the executor, was evidence of an assent. In this, there is no error. Acquiescence by an executor in a long-continued possession by a legatee, of the property bequeathed, will raise the presumption of an assent to the legacy by the executor. To make an assent by an executor it is not necessary that he should use any words of assent or deliver over the property bequeathed. *White* v. *White*, 4 Dev. Rep. 257; S. C., 1 Dev. and Bat. 260. In this case the plaintiff's wife was in possession of the slave for near ten years.

Upon the second point, we agree with his Honor. The legal title is in the plaintiff, and though the plaintiff's wife might have entered into the contract, mentioned in the case, it was in parol and executory, and, therefore, under the statute of frauds, was of no force and void as a sale. It could not operate as a pledge, for the slave never was delivered by the legatee to the defendant. Lunda continued to live on the farm up to the time of her marriage, and the negro continued to work with the other slaves for the joint support of the family. She was, therefore, in her possession. Nor can the fact, that when she and her husband removed to his residence, they did not take the slave with them, weaken this conclusion, for the case states they took with them none of her property.

Nor could the agreement be a mortgage, for, as before stated, it was verbal—not reduced to writing.

There is no error.

PER CURIAM. Judgment affirmed.

WILLIAM ARCHIBALD AND RHODA, HIS WIFE, *vs.* WILLIAM H. DAVIS.

A copy of a grant taken from a book in the office of the Secretary of State, purporting to be issued in 1716, by Charles Eden and others, who were the Governor and Council, although but lately registered, is admissible as evidence of title.

A record of proceedings of a Court ordering partition of a tract of land, and a long acquiescence and actual occupation by the heirs according to the proceeding, is obligatory on them, and one thus acquiescing, who was mentioned as one of the heirs, in the body of the petition, but was not made a party plaintiff or defendant, is bound by the proceeding, and, therefore, may offer it in evidence in support of his title.

When the report of commissioners, making a partition and appropriation, is confirmed by the Court, and filed in the papers of the case, it is *enrolled*, so as to meet the requisition of the Act of Assembly.

A plot by a surveyor, representing various tracts and lots of land of the ancestor, corresponding in number with the number of heirs set out in the petition, filed with the papers of the case, and registered with them, was properly taken as the plot referred to in the report of the commissioners, and admitted as evidence to explain such report.

It was *Held*, not to be error in a Judge to leave it for the jury to decide whether the cutting down of 182 timber trees entitled the party to more than nominal damages, and if so, how much.

This was an ACTION of TRESPASS q. c. f., tried before MANLY, J., at the last Beaufort Superior Court, in which the plaintiffs claimed title to the *locus in quo*, through a grant from Chas. Eden, Chris. Gale, Fra. Foster, Nath. Chevin and Wm. Reed, to Tobias Knight, for 345 acres, dated 9th day of September, 1716, a copy of which was produced and certified by the Secretary of State to be "a true copy of the record of a grant taken from a book in this office;" on the back of which copy

is this entry—"Registered in the register's office of Beaufort County, in book no. 29, page 45,"—(signed by the register.) The admissibility of a grant from these persons was objected to; and it was further objected that the authentication of this copy was insufficient. These objections were overruled and the deed admitted. Defendant excepted.

Proceedings for the partition of lands between the heirs of James Latham, (of whom the feme plaintiff, Rhoda, was one,) in the County Court of Beaufort, were introduced. It appeared from the petition and proceedings for partition, that her name was not inserted as a petitioner, nor was she or her husband made a party defendant; and there is no evidence of any service, or other notice, to either of them: but in the body of the petition "Rhoda Archibald, wife of William Archibald," is mentioned as being one of the heirs-at-law of James Latham. It appeared further, from the record of the case, that "the prayer" of the petition "was granted," and Wm. Vines and others (naming them) were appointed commissioners "to divide the lands:" a writ issued to these commissioners, commanding them to make partition among the heirs-at-law, naming Rhoda Archibald, wife of Wm. Archibald, and six others, as heirs-at-law of James Latham, dec'd. At May Term, the record of Beaufort County Court shows as follows: "May Term, 1828. Lands divided. Report of commissioners filed. Report returned and confirmed, and ordered to be registered." The report is filed in the office of that Court. It sets out a division of the lands into seven parts or shares, among the seven heirs of James Latham, and is signed by the commissioners. On the record is an endorsement as follows: "Washington, 17th of May, 1854. I do hereby certify that the foregoing report is registered in my office in book no. 28, pp. 510 and 511." Signed by the register. Plaintiffs entered, and have ever since claimed, under this proceeding. This report was objected to, but admitted. Defendant excepted.

Among the papers filed in the case, in the County Court, and registered with them, is a plot, which is thus entitled—

"James Latham's Lands. There is, in all, 2137 acres, belonging to the heirs of J. Latham; surveyed by Reuel Windley, D. surveyor." A plot is several times referred to in the report above mentioned, and the several lots, and different tracts mentioned in this survey, (13 in number) are referred to consistently in the said report. Without some plot there could be no identification or certainty as to any share of the lands laid off by the commissioners. Objection was made to this paper as evidence, but admitted by the Court. Defendant excepted.

It appeared on the trial, that 182 trees, for timber, had been cut down, but not taken off at the institution of the suit; and it was contended that this would entitle the plaintiff to nominal damages only. His Honor left the question of damages to the jury, with instructions to find the actual damages up to the bringing of the suit. Defendant again excepted.

Verdict and judgment for the plaintiffs. Appeal by defenant.

Donnell and *Shaw*, for plaintiffs.
Rodman, for defendant.

Battle, J. On the trial, several objections were made by the defendant, which are set out in his bill of exceptions, and which we will proceed to consider.

1. The defendant objected to the introduction by the plaintiff of a grant from Charles Eden, Christopher Gale, and others, to Tobias Knight, for three hundred and forty-five acres of land, lying in the precinct of Hyde, (now part of the County of Beaufort,) made on the 9th of September, A. D., 1716. A copy of this grant has been obtained from the Secretary of State, in whose office it was found deposited, and had been recently registered in the office of the register of Beaufort County. The objection is, that the persons who purported to make the grant had no power to do so, and that it had not been properly proved and registered; at least, not in due time. The answer is found in what is called "The great deed of grant," from the Lords Proprietors of the province of Caro-

lina to Samuel Stephens, Governor of the County of Albemarle, and to his councillors, bearing date May 1st, 1668, by which they granted "full power and authority unto the said Governor and his successors, by and with the consent of the council or major part thereof, to issue grants for lands lying in the County of Albemarle, to the inhabitants thereof, to be held upon the same terms and conditions upon which the inhabitants of Virginia held their lands." See 2 Rev. Stat. 13. The grantors, in the present case, were the Governor and Council of the Province, at the time when the grant was issued, and the grant itself was recorded in a book now on file in the office of the Secretary of State. The grant was, by the provisions of the great deed, required to be registered, which, as far as we know, was not done; but by the last clause of the 24th section of the 42nd chapter of the Revised Statutes, it was enacted that, "it shall, and may be, lawful for any person to cause to be registered in the office of the register of the County where the land lies, any certified copy of a grant from the office of the Secretary of State, for the lands lying in such County; and such registration, duly made, shall have the same effect in law as if the original had been registered. There does not seem to be any limitation as to the time within which such copies must be registered, but if there be, it has been extended by the acts which are passed at every session of the General Assembly, for the purpose of allowing all such grants, deeds and conveyances, to be proved and registered, which have not heretofore been done so.

2. The second objection was to the admissibility of the records of the proceedings for the partition of the lands of James Latham, among his heirs-at-law, because the feme plaintiff, who was one of the heirs, was not made a party to it; and further, because the return of their proceedings and the appropriations made by the commissioners, were not enrolled as required by 1 Rev. Stat., ch. 85, sec. 1, (Rev. Code, ch. 82, sec. 1.) The first part of the objection is clearly untenable. The wife of the plaintiff was not, indeed, made a party, but she is mentioned in the petition as one of the heirs among

whom the partition was prayed; a share was allotted to her, and she and her husband have acquiesced in it ever since it was made in the year 1828, and now claim under it. It is too late for her, much less a stranger, to object to it at this time. The other part of the objection is equally unfounded. The proceedings were enrolled when they were placed by the clerk among the records of his office, just as acts of the Legislature are enrolled when they are duly ratified and deposited in the office of the Secretary of State. They are not required to be recorded in "proper books," like wills, (Revised Statute, ch. 122, sec. 4; Revised Code, ch. 119, sec. 13,) nor in a "well-bound book," like the returns of justices' executions levied on land, (1 Rev. Stat., ch. 62, sec. 16; Rev. Code, ch. 62, sec. 17,) but simply to be enrolled; that is, placed by the clerk of the Court among the records or rolls of his office. This will satisfy one meaning of the term "enrolled," and as the proceedings are required to be "registered" also, we can hardly suppose that the Legislature intended that they should be recorded in another book.

3. The third objection was the introduction of the plot of the survey of the division of the lands among the heirs, because it did not purport on its face to have any connection with the partition made by the commissioners. It was registered with the other papers, and was found among them in the clerk's office. A plot is referred to in the return of the commissioners as being "herewith." The one offered in evidence purports to be a survey of the lands of James Latham, dec'd., and the lands are divided into lots corresponding with the number of heirs. Under these circumstances, we think, the plot in question formed a part of the proceedings in the cause, and with them was properly admitted in evidence by the presiding Judge. The case of *Morrison* v. *Laughter*, 2 Jones' Rep. 354, cited by the defendant's counsel, does not apply, because there the petition did not refer to the deed in question, nor any deed as containing a more certain description.

4. The fourth and last objection was to the charge of the

Judge upon the question of damages. The defendant contended, that as, at the time when the writ issued, the trees which he had cut down had not been carried away, the plaintiffs were entitled to only nominal damages. The case states that the question of damages was left to the jury to find the actual damages up to the bringing of the suit. Under this instruction, the jury gave a verdict for seventy-five dollars, damages, the proof being that one hundred and eighty-two trees had been felled. As the damages were certainly more than nominal, we thought at first that the jury might have misunderstood the charge, and taken into consideration the carrying away of the trees, and that the charge was liable to objection for not being sufficiently explicit; upon reflection, we have come to a different conclusion. There was no testimony, so far as we can see, that the trees had been made into timber and carried off at all by the defendant; but if there were, the fact was called to the attention of the jury, that they were not so before the suit was brought, and then the jury were expressly told that the actual damages up to the bringing of the suit was the rule by which they were to be governed. We have no means of knowing that the cutting down simply of one hundred and eighty-two timber trees was not an actual damage to the plaintiff to the amount of seventy-five dollars, which is at the rate of about forty cents per tree. In the absence of any such information, we must suppose that the verdict was correct, according to the instruction which the jury received. If there were any actual damage at all, the instruction was undoubtedly a proper one.

There is no error, and the judgment must be affirmed.

Per Curiam. Judgment affirmed.

ALBERT WHITE *vs.* W. W. GRIFFIN.

An action on the case will lie in behalf of a bailor against one who commits a trespass upon the property bailed; and the plaintiff is entitled to at least nominal damages, though no actual injury is done to the property.

This was an action on the case, for unlawfully seizing and detaining a vessel, called the *Belle*, belonging to the plaintiff, tried before Bailey, Judge, at the Spring Term, 1854, of Pasquotank Superior Court.

The vessel had been chartered to one Burgess, to make a voyage from Elizabeth City, in this State, to the West-India Islands.

While lying at the wharf at Elizabeth City, nearly ready for sea, the cargo on board the Belle, which belonged to one Williams, was unlawfully seized by a constable, by virtue of executions, in favor of the defendant; and the said constable, acting under the directions of the defendant, took possession of the vessel, and detained her nearly a week at that port, when she was recommitted to the charge of Burgess, who immediately proceeded on his voyage. There was evidence tending to show that, during the time of this detention, the wind was fair, and that the voyage might have been made in safety, but after that time, the weather became stormy, and the vessel was in consequence delayed at a very dangerous port, where she encountered a violent tempest, in which she was wrecked. The plaintiff sought to recover, in this action, for the loss of the ship.

The Court intimated an opinion, that the plaintiff was not entitled to recover any thing. In deference to his Honor's opinion, the plaintiff took a nonsuit and appealed.

Heath and *Jordan*, for the plaintiff.
Pool, *Smith* and *Martin*, for the defendant.

Nash, C. J. We think there is error in the Judge's opinion. He doubtless came to his conclusion, from the belief

that the plaintiff could not recover the value of his vessel from the defendant, which he certainly could not, (though the detention by him might have been the remote cause of the loss of the vessel) and by not adverting to the principle, that for every tortious act committed as to the property of another, the perpetrator is answerable, in damages, to the owner, either in case or in trespass. If the trespass is committed on property while in possession of the owner, "trespass" is the proper remedy; if while in the possession of another as bailee, the owner having but a reversion of the property, the action is "case." This is an action of the latter character—the vessel being in the actual possession of Burgess at the time the act was committed. The vessel was the property of the plaintiff, and by him chartered to Burgess for a trip to the West Indies. She was loaded with staves, the property of a Mr. Williams, and while lying at the wharf at Elizabeth City, and ready to start on her voyage, one Banks, a constable, came on board and levied several executions on the staves. In one of these executions the present defendant was the plaintiff, and Banks acted by his directions in making the levy. The executions were all against Burgess; the staves belonged to Williams. The levy was illegal; in consequence of it, the vessel was detained in port six days, and though the plaintiff is not entitled to ask for damages for the loss of the vessel, yet, he is entitled, at least, to nominal damages from the defendant, for his illegal detention, by having his execution improperly and illegally levied. *Venire de novo.*

Per Curiam. Judgment reversed.

H. M. PRITCHARD *vs.* C. J. FOX.

A warranty on the sale of a soda-fountain, that it was *in good condition*, is broken, if, from an inherent defect in its construction, existing at the time of the sale, it was liable to get out of order, from time to time, and from that

cause failed to answer the purposes for which it was designed, although it was in a condition to make good soda-water on the day of sale.

The measure of damages in such a case is the difference in the value of the article, provided it had been in good condition, and its value as it was in its then state.

ACTION of ASSUMPSIT for the breach of warranty, tried before BAILEY, Judge, at a Special Term, (June, 1856,) of Mecklenburg Superior Court.

The plaintiff offered as evidence of the contract between the parties, a paper-writing, as follows: "September 12th, 1853. Know all men by these presents that I have this day sold to H. M. Pritchard, a soda-fountain and fixtures, represented to be in good condition, which good condition I warrant. In witness, &c." Signed without a seal by the defendant.

Plaintiff introduced evidence, tending to show that the soda-fountain, sold to him by the defendant, was not in good condition on the day of the sale, and that it was not adapted to the purposes for which it was intended.

The defendant offered evidence tending to show, not only that the machine in question was in good condition on the day of sale, but that there was no material defect in its construction, and he called upon the Court to instruct the jury, that if the soda-fountain was in good condition on the day of sale, and would make good soda-water on that day, the warranty was not broken, and that if it had got out of order, the measure of the plaintiff's damages would be the costs of reparation.

The Court charged the jury, that the warranty extended, not only to the state of the soda-fountain on the day of sale, but that it was a warranty that it should answer the purposes for which it was intended; and that although it was in good condition, and made good soda-water on the day when the plaintiff purchased it, yet if it was liable to get out of order, from time to time, by reason of some defect in the instrument itself, which existed at the time of the sale, and thereby ren-

dered it unfit for the uses for which it was designed, then there would be a breach of the warranty, and the measure of the plaintiff's damages would be the difference between the value of the article, if it had been in good condition, and the actual value of it in its then state. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal by the defendant.

Osborne, for the plaintiff.
Wilson and *Boyden*, for the defendant.

Nash, C. J. The question presented is as to the correctness of the Judge's charge. The action is for the breach of a warranty in the sale of a soda-fountain. The contract is in writing. After stating the sale of the fountain and fixtures, it says, "represented to be in good condition, *which good condition I warrant*."

The defense was, that the soda-fountain was in good condition on the day of the sale, and that there was no material defect in its construction; and that if the fountain was in good condition on the day of the sale, and would make good soda-water on that day, the warranty was not broken, and that if it got out of order, the measure of the plaintiff's damages was the cost of repairs.

His Honor's charge was, we think, correct. He informed the jury that the warranty was not confined to the day of the sale, but that it extended beyond it, and that in effect it extended to the future usefulness, for the purpose for which it was intended; that though it might have been in good condition on the day of the sale, and on that day made good soda-water, yet, if it was liable to get out of order, from time to time, by reason of some defect in the instrument itself, which existed at the time of the sale, and thereby rendered it unfit for the uses for which it was designed, the warranty was broken.

The defendant insisted that, if the fountain was in good condition on the day of sale, there was no breach of the warranty. There is an old maxim, "*qui hæret in litera hæret in*

cortice." What was the understanding of the parties at the time of the sale? For what purpose did the plaintiff buy the fountain, or the defendant sell it? Was it to make soda-water for a day? Certainly not; but with the expectation and belief that it would last some time at least beyond that day. The jury were instructed that, if from some inherent defect in the fountain, existing at the time of the sale, it was useless for the purposes for which it was intended, the warranty was broken. Can there be any doubt that the law is so? A sells to B a horse, knowing well the use for which B buys him, and warrants him to be a safe horse in harness. For a few days the horse works very gently, but in a short time runs away with the carriage and breaks it. A is sued for a breach of warranty, but his reply is, I only warranted him to be gentle on the day of the sale, and on that day he worked gently. Would that defense avail him? Surely not. The reply of B would be, "I bought him from you as a gentle, well-broke horse, and intended him not only for present, but future use. The fact, that he afterwards ran away and broke the carriage, is evidence that the defect existed at the time of the sale." So, here, if the defect in the fountain was inherent in the thing itself, either as to material or workmanship, not casual, but rendering it useless, the defect was in existence at the time of the sale, and the warranty was broken. It is sufficient, in pleading, to set forth the substance of the contract, and of course to prove it. 1 Phil. on Ev. 208, 209.

Upon the question of damages, his Honor was correct in stating the law. If the article was useless for the purpose for which it was intended, the measure of damages was as charged. If the machine, by accident, got out of order, and was easily repaired, it would have been the duty of the plaintiff to repair it, and not seek to throw the fountain on the defendant; but where the defect is inherent in the machine, the expense of keeping it in order might, in time, exceed the price given for it.

This being a matter of construction of an express warranty,

we are satisfied, that the proper one was placed upon it by his Honor.

PER CURIAM. Judgment affirmed.

J. A. POOL, ADM'R., TO THE USE OF WILLIAM E. MANN, *vs.* T. HUNTER *et al.*

A sheriff who has failed to assign a bail-bond, cannot recover against the obligors to the same, until he has paid the money to the plaintiff in the judgment, or at least, until there is a judgment against him for it.

ACTION of DEBT, tried before his Honor Judge SAUNDERS, at the Fall Term, 1855, of Pasquotank Superior Court.

Sometime in the year 1851, Wm. E. Mann sued out a writ against one Hendrickson, returnable to the Fall Term, 1851, of Pasquotank Superior Court, and placed it in the hands of the plaintiff's intestate, who was then the sheriff of that County. The writ was executed, and the sheriff took from Hendrickson and the defendants in this case, the bond sued on, as a bail-bond for the appearance of the principal, according to the exigency of the said writ, and returned it with the writ; but the sheriff died before the said bond was assigned to the plaintiff. At Spring Term, 1852, of the Court, Mann obtained a judgment against Hendrickson, which is still unsatisfied. There has been no payment of this judgment by the sheriff, or his adm'r., and no proceeding against his personal representative by Mann, to recover the amount. Hendrickson had left the State, and was insolvent when the suit was brought.

The defendants contended that there could be no recovery upon this bond, by the adm'r. of the sheriff, until he first paid the amount of the judgment to Mann, and his Honor, being of that opinion, so instructed the jury. Plaintiff excepted.

Verdict for defendants. Judgment and appeal.

Pool, *Jordan* and *Smith*, for plaintiff.
Heath and *Hines*, for defendants.

Pearson, J. The general rule is, that an action cannot be sustained on a bond taken for the purpose of indemnity, until the party has sustained loss by paying money in consequence of the default of the person against whose acts the indemnity is taken; for, until then, the action may be met by the plea of *non damnificatus*. There are some exceptions to this rule. An absolute and certain liability to pay, will, in many cases, amount to a breach, and fix the measure of damages; for, in such a case, it is against reason, and against the intention of the parties, that the one shall be obliged actually to pay the money before he call upon the other to save him harmless, and the purpose is not answered if the one is first compelled to make payment. For instance, if an officer takes a bond for the forthcoming of property which has been levied on under an execution, the statute gives the officer a summary remedy by motion, before he has paid the money, because his liability is absolute and certain, and an officer might well hesitate before taking a forthcoming bond, if he was obliged to pay the money in the first instance. This remedy, we suppose, is cumulative, and the officer might have maintained an action at common law for a breach of the bond in failing to deliver the property, as the damages are fixed by the amount of the execution. So, we suppose, if a sheriff appoint a deputy, and take a bond, with sureties, for the faithful discharge of his duty, by the deputy, and there is a breach of duty, whereby the superior is subjected to an absolute and certain liability, he may sue on the bond before he has actually paid the money; for, such was the intention of the parties, and the purpose for which the bond was given.

The question is, whether the liability of the plaintiff was absolute and certain. By failing to assign the bail-bond he became liable as special bail, according to the provisions of the statute; but the plaintiff in the judgment is not obliged to resort to his remedy against the sheriff, as bail. He may is-

sue a *fi. fa.* against the goods of the defendant; or, if the defendant is insolvent, (as is stated in this case,) and the plaintiff in the judgment elect to proceed against the sheriff, he must issue a *sci. fa.*, and the plaintiff can discharge himself from all except the costs of the *sci. fa.*, by bringing in the body of the defendant at any time before final judgment, or he may be discharged by the death of the defendant. So, his liability is not absolute and certain until he pays the judgment, or, at least, till a judgment is taken against him. *Barker* v. *Munroe*, 4 Dev. 412.

We find no authority in point upon our statute; but it seems settled in England, upon the statute of Anne, in respect to the assignment of the bail-bond to the writ, or "bail below," taken by the sheriff, which he is authorised to assign to the plaintiff in the action, if the defendant fails to appear, that if the sheriff does not assign the bond he cannot sue upon it until he has actually paid the debt and costs. Watson on Sheriffs, 81; 2 Saunders' Rep., Williams' Note, 61, a. There is no error.

PER CURIAM. Judgment affirmed.

NEAL AND RICHARDSON *vs.* THOMAS WILCOX.

An inn-keeper, by the *custom of the land*, is liable as an insurer for the goods and animals which his *guest* has with him for the purposes of the journey.

But if his customer is only a boarder, or the goods and animals are entrusted to the landlord upon a special contract, or if they are not placed in the *inn* or its appurtenances to be kept, he is only liable for negligence, as any other bailee.

Hence, an inn-keeper is not liable, without proof of negligence, for the loss of a mule, put, by a "drover," into a lot belonging to the landlord, separate from the inn, to be kept under a special agreement.

ACTION on the CASE for the loss of a mule, tried before

SAUNDERS, J., at the Spring Term, 1856, of Jones Superior Court.

The plaintiffs declared on *the custom*, against the defendant as an inn-keeper. The plaintiffs were engaged in the business of buying and selling horses and mules. The defendant was the keeper of a tavern at Trenton, in the County of Jones. The plaintiff Neal had stopped at the tavern with his wife, and they were boarding there. There was evidence tending to show that a drove of mules belonging to the plaintiffs were put into a lot adjoining the defendant's stable-lot, and were fed by the plaintiffs themselves, with provender bought by themselves, and they were assisted in taking care of the animals by the landlord's servants. While Neal was temporarily absent, the mule in question got away from a boy belonging to the defendant, as he was taking it to water, and was lost. There was no allegation, or proof, that proper diligence had not been used to recover the animal.

His Honor charged the jury that, if the defendant held himself out as a public inn-keeper, and one of the plaintiffs was his guest, and the mule, at the time, was in his keeping, and had escaped, defendant would be liable for the loss; but if the plaintiff was a boarder, and had the privilege of the defendant's lot, and was himself the keeper of the mule, then he would not be answerable.

Verdict and judgment for defendant. Appeal.

Donnell, for plaintiffs.

No counsel for defendant in this Court.

PEARSON, J. This is an action on the case, on the "custom of the land," against the defendant, as an inn-keeper, for the loss of a mule. In this action, on the ground of public policy, common carriers and inn-keepers are treated as insurers, and are liable, except "for the acts of God, and the enemies of the State," without proof of negligence. In which respect it differs from an ordinary action on the case against a bailee. In our case, there being no proof of negligence, the plaintiff

properly declared "on the custom." If he could have made this proof, it would have been most proper to declare on the special case; for a recovery in that action may be made against an inn-keeper, who is guilty of negligence, in many instances, where he would not be liable in "case" on the custom: for instance—one takes boarding at an inn, on a special contract; his goods are lost, the inn-keeper is not liable "on the custom," but is liable in a special action on the case, if negligence be proved. So, if one leave a trunk or carriage to be kept by an inn-keeper, or if one deliver a flock of sheep, or a drove of mules, or horses, to an inn-keeper to be pastured, he is only liable as bailee, on proof of negligence.

The ground of public policy, on which an action on the case "on the custom" is given against inn-keepers, is that persons who are travelling through the country are under a necessity of putting up at inns for entertainment—*transeuntes causa hospitandi*, (from which last word they are called "guests,") without knowing anything about the character of the house; for which reason the law gives an assurance of the safety of their property—that is, the goods and animals (*bona et catalla*) which they have with them for the purposes of their journey.

The reason restricts this action to *guests* as distinguished from *boarders*, who sojourn at an inn on a special contract. 3 Bac. Abr. 666, "Inns." It is sometimes difficult to draw the line between guests and boarders. They frequently run into each other, like light and shade. So, the line between *a common carrier* and *a bailee to carry*, is sometimes scarcely perceptible; but the law makes the distinction, and it is the province of the Judge to draw the line. A transient customer at an inn, although he be not a traveller or stranger, is considered as a guest; a lodger, who sojourns at an inn, and takes a room for a specified time, and pays for his lodging, on a *special agreement*—as, by the month or week, is a boarder. *Bennett* v. *Wilson*, 5 T. R. 273.

So, the reason restricts the action to one *who comes for entertainment—causa hospitandi.* If one peddling merchandise

puts up at an inn, and, besides his sleeping apartment, takes a separate room in which to show and sell articles—clocks and watches, for instance—these articles are not within the protection of the rule. *Burgess* v. *Clements*, 4 M. and S. 306. So, if one having a drove of horses or hogs to sell, puts up at an inn, and, besides entertainment for himself, procures from the landlord a lot in which to keep his animals, for the purpose of showing and selling them, they are not specially protected; and it makes no difference whether, by the agreement, the landlord has them fed, or whether the drover buys provender of the landlord or a third person, and feeds them himself; for, as Lord Ellenborough says, in the above case, "An inn-keeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging." The rule is restricted to such goods and animals as the guest carries with him for the purposes of his journey; "a flock of sheep is not comprehended among the *bona et catalla transeuntis*, which an inn-keeper is bound to receive and protect. *Hanby* v. *Smith*, 25 Wendell 642. If such articles are received, the inn-keeper is only liable for neglect as a bailee. The policy fixing this special liability of inn-keepers is to encourage travelling and intercourse among the citizens, and does not reach so far as to take in considerations of trade and commerce.

So the reason restricts the action to the things that are in the house and stables—*infra hospitium*, and does not extend to a horse that is put to grass according to an understanding between the inn-keeper and the guest. *Calye's* case, 8 Rep. 32. This applies to horses and mules put into a lot by agreement of the parties.

From these principles, it is clear that the plaintiffs have no right to complain of his Honor's charge. The defendant had a right to expect him to be more specific in respect to the distinction between a guest and a boarder—what things are within the protection of the rule, and what are left to the liability of an ordinary bailee, and what place is within the inn—*infra hospitium.*

Upon all these points, according to the facts found by the jury, the defendant was entitled to a verdict. Any one of them was sufficient for his purpose. There is no error.

PER CURIAM. Judgment affirmed.

Doe on the demise of SAMUEL N. BLACK *vs.* DAVID T. CALDWELL,

The compromise of a doubtful claim to land, and a conveyance of the disputed land from a daughter and her husband to the father, were properly left to the jury on a question as to the fairness of the conveyance of a deed from the father to the son-in-law.

A party seeking to avoid a conveyance as voluntary, has no ground to complain of the principle thus laid down: "Where a parent greatly embarrassed, which embarrassment ends in insolvency, makes a conveyance to a child, it devolves upon the child to show that he gave a fair price for the property, actually paid, either in money or money's worth."

ACTION of EJECTMENT, tried before ELLIS, J., at the Spring Term, 1856, of Mecklenburg Superior Court.

The lessor of the plaintiff claimed title to the land in controversy, by virtue of a sheriff's deed, and a judgment and execution against William Davidson, in 1853.

The ground upon which plaintiff's lessor claimed to be a creditor was as follows: In 1823, William Davidson conveyed a tract of land belonging to his children, of whom the wife of defendant was one, to John Black, the ancestor of the lessor of the plaintiff, and covenanted for quiet enjoyment, and to make title when his children should come of age. The defendant and his wife refused to make title according to the covenant, but sued for the possession of their share of the land and recovered it. In 1853 Davidson confessed judgment to a suit for a breach of these covenants, and the execution issuing on this judgment, was the process under which the land in question was sold.

In the year 1833, the said Davidson had conveyed the

premises to the defendant, his son-in-law, by a deed expressing a consideration of $5000. The deed was made in March, and registered in April following. At the May session following, of the County Court of Mecklenburg, judgments were obtained against the said Davidson for various sums, amounting, in all, to about $17,000.

William Davidson was himself examined by the plaintiff, and he testified that when the deed was made to the defendant, no money was paid, and that the deed was made as an advancement to his daughter, the wife of the defendant; that he was in embarrassed circumstances at the time, but he was of opinion then, and still thought, that he reserved enough property to pay all his debts; that all the debts which he then owed had been discharged; that his property was all sold about the year 1841, for debts which had been contracted since the deed was made to the defendant; that he had nothing, when plaintiff's execution was levied, that could be taken in execution.

On being shown by the defendant's counsel a deposition that had been given by him, to be read *de bene esse*, he said that there was a valuable consideration for the deed in question; that Thomas Davidson had devised 5000 acres of land to Mary L. Davidson, witness' daughter, who died without issue, and supposing he was his daughter's heir, he sold the same on a credit, but the purchasers believing his four remaining children entitled to the land, refused to pay the purchase money until they should convey to him their interests, which they did in 1830, the defendant and his wife joining in the deed; that he had sold the land in 1824, and afterwards collected the money, ($11,000;) but he had been at great expense, and did not believe the defendant's share would have been more than $1400; but he said the land had greatly increased in value since; that this indebtedness for the sale of the Tennessee land, did enter into, and form a part of the consideration of the deed in question; that the deed was not made to hinder or delay his creditors, for he told defendant that he would get no title unless all his debts, then due, were

paid off. He said he mentioned this because he had conveyed the same land in a deed of trust.

There was much other testimony as to the pecuniary condition of Davidson in 1833, the value of the land in question, and as to the value of the lands sold by Davidson in Tennessee, in which there was much discrepancy. The deed from defendant and wife to Davidson, recited that the said lands had descended to defendant from Thomas Davidson, and that the consideration of said deed was $10,000.

John Irwin, a witness for the defendant, amongst other things, stated that, in 1836, as agent of the bank of Charlotte, he had made a scrutiny into the affairs of Mr. Davidson, and he then thought him worth at least $15,000, more than his indebtedness. He also stated that Mr. Davidson had told him that his children had conveyed property to him greater in amount than all he had conveyed to them, and that he was still indebted to them.

The Court being of opinion that notwithstanding the fact that the judgment under which the land in controversy was sold was subsequent to the conveyance to the defendant in 1833, that yet, as the covenant for quiet enjoyment was made before, and it was known to the defendant and to Wm. Davidson, that the latter had no title to the land sold to Black, the obligee in that covenant would be placed upon the footing of a pre-existing creditor, and accordingly his Honor charged the jury that it was a debt existing at the time of the conveyance to the defendant in 1833. Upon the question of fraud he instructed that, if the conveyance from Wm. Davidson to the defendant was voluntary, and without consideration, the plaintiff ought to recover, because it appeared that there was nothing else from which the execution under which the land was sold could be satisfied, though Wm. Davidson had other property enough to pay all his debts at the time of the conveyance. It was then submitted to them as a question of fact, whether the deed was voluntary or not. They were told that the evidence showed an interest in the lands in Tennessee in the defendant and his wife, and they were charged to consid-

er that part of Wm. Davidson's testimony in which he stated that the conveyance of their interest in those lands by the defendant and his wife, in 1830, was the inducement for his making the conveyance, and entered into, and formed a part of the consideration for making the deed, in 1833, for the land in controversy, as evidence tending to show a consideration for the deed.

The Court further instructed the jury that where a parent greatly embarrassed with debt, which embarrassment resulted in insolvency, makes a conveyance of any part of his property to a child, it devolved upon the latter, should the conveyance be questioned, to show that he gave a fair price for the property, actually paid in money or money's worth; that they should determine whether the conveyance of the defendant of his interest in the lands in Tennessee entered into the consideration of the deed from Wm. Davidson, and, if so, whether it was a fair compensation for the lands conveyed. Plaintiff's counsel excepted to these instructions.

Verdict for the defendant. Judgment and appeal.

Wilson and *Dargan*, for plaintiff.
Osborne and *Boyden*, for defendant.

Nash, C. J. There is no error in the charge of his Honor. The case turns upon the evidence of Mr. Davidson. The defendant was his son-in-law, and the premises in question had been conveyed to him by Mr. Davidson for a valuable consideration as expressed in the conveyance. The plaintiff alleges that no valuable consideration was paid by the defendant, and that the deed was voluntary and void as to the creditors of Mr. Davidson, and that he was one. Mr. Davidson was introduced as a witness, and upon his examination in chief, stated that the conveyance was voluntary, and intended as an advancement of his daughter, Mrs. Caldwell. His attention was called to a deposition given by him in a former suit, where the same question arose, in which he had stated that there was a valuable consideration for the conveyance. He

replied that it was so; that there was a valuable consideration; that he was younger then than he was now, and the transaction fresher in his memory. That when he made the conveyance he was much involved in debt, but reserved property enough to discharge them all, and, at the time, told the defendant that he would get nothing by the deed unless all the debts he then owed were paid, and that they were all payed; that since then he had incurred heavy debts, and was unable to pay them all. In stating the consideration for the conveyance to the defendant, he stated that the defendant owned one-fourth of the tract of land in Maury County, in the State of Tennessee, and that interest, conveyed to him, was the consideration. He further stated that the land in Maury County had been devised by Thomas Davidson to Mary L. Davidson, his daughter, who having died without issue, he considered himself the heir, took possession of it, and sold it for $11,000. The purchasers would not pay the money until he procured his children to join in the deed, which they did, the wife of the defendant being one of them, and that $1400 was the portion of each. Upon this part of the case, his Honor instructed the jury, that where a parent, greatly embarrassed with debt, which embarrassment resulted in insolvency, makes a conveyance of any part of his property to a child, it devolved upon the child to show that he gave a fair price for the property—actually paid in money, or money's worth; and in this case, if they believed that Wm. Davidson's embarrassment, in 1833, resulted in insolvency, they should return a verdict for the plaintiff, unless they were satisfied from the testimony that the defendant paid a fair price for the land in controversy. That they should determine whether the conveyance of the land in Tennessee entered into the consideration of the deed from Wm. Davidson, and, if so, whether it was a fair compensation for the lands conveyed.

We think the plaintiff has no cause to complain of this charge, and the jury were justified in the verdict they ren-

dered; for Mr. Davidson swore that the lands in Tennessee had greatly risen in value since he sold them.

We express no opinion upon the part of the charge in which his Honor decided, that the lessor of the plaintiff was a creditor of Wm. Davidson at the time of the conveyance to the defendant. If there is error in it, it was in favor of the plaintiff, the appellant. The charge embraced substantially all the grounds upon which the Court were requested to instruct the jury.

PER CURIAM. Judgment affirmed.

KENNETH HYMAN, ADM'R., *vs.* HENRY GRAY.

Where one sues as administrator, he is not bound to produce his letters of administration on the trial.

Where one receives money as an agent, no cause of action accrues until a demand is made, and consequently, the statute of limitations runs only from that time.

Where an agent has money in his hands, and when demanded, denies his obligation to pay, there is no principle upon which he can be charged, with interest further back than the time of such demand.

ASSUMPSIT, tried before PERSON, Judge, at the Spring Term, 1856, of Martin Superior Court.

In 1840, the defendant received, in the way of the compromise of a law-suit, a sum of money in which his brothers and sisters, and their children, were interested, as well as himself. In compromising the suit, and receiving the money, the defendant acted as the agent of the next of kin of one Pearce, from whose estate it was derived. Among these next of kin was the plaintiff's testator, William Rhodes, who was the only child of Catharine, a sister of the said Pearce. His mother and himself had removed from the State some years before the death of Pearce, and she and her husband both died before her brother. It was reported that William, the son, was

also dead, without leaving issue, the defendant, &c., being his next of kin. Under this impression, his share was distributed and paid over to these next of kin. It turned out, however, that William was not dead when the money was distributed, but had only died a year or two before this suit was brought. The plaintiff having administered on the estate of William Rhodes, demanded his share of the money, but the defendant replied, "he had paid over all in his hands and had receipts for the same," and added, "if he had not paid it, it was out of date;" so, he refused to pay.

Upon this state of the case, the defendant's counsel asked his Honor to instruct the jury, 1st. That the plaintiff could not recover, because he had not produced the record of his appointment as administrator.

2nd. That as William Rhodes was living when the defendant received the money, his cause of action then accrued, and that the statute of limitations began to run from that time.

But the Court charged, that the cause of action did not accrue until a demand was made, and the statute did not begin to run till that time. He further charged, that if, when the demand was made, he denied the obligation to pay the money, and refused it, the defendant would be liable for interest from the time he received it in 1840. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Donnell, for plaintiff.
Winston, Jr., for defendant.

Pearson, J. 1. Where a plaintiff sues as administrator, "profert" of his letters of administration must be made in the declaration, and the defendant may crave "oyer," but the plaintiff is not bound to produce them at the trial. This is a familiar rule of pleading.

2. The defendant, having received the money as the agent of the plaintiff, was not bound to seek him for the purpose of paying it over; so, we agree with his Honor, that the cause

of action did not accrue until a demand; consequently the statute of limitations did not begin to run until the demand.

3. It is clear, as the defendant was in no default until the demand, if he had then paid over the money, he would not have been chargeable with interest. We can see no principal upon which he can be charged with interest, except from the date of the demand. Because of the fact, that instead of paying the money, when called on, he said, "he had paid it, or, if not, it was out of date, and he should not pay it," he was wrong, and was put in default from that time; but how it can have relation back, we are unable to see. If it did relate back so as to terminate the agency, and give the plaintiff a cause of action, and thereby entitle him to interest, it would necessarily have the further effect of letting in the statute of limitations.

There is error in regard to the interest, and, as the case is presented, we are not able to enter judgment for the proper amount, but must direct *a venire de novo.*

PER CURIAM. Judgment reversed.

Doe on the demise of JOHN NEWLIN *vs.* MATTHEW OSBORNE.

The date of a deed which is proved to have been delivered, is *prima facie* evidence that it was executed on that day; but where it is proved that it was signed and sealed, but not delivered on that day, it has no operation as a deed, until such time as it is shown to have been delivered, and until such time, any declaration made by the grantor, affecting the title, is evidence.

THIS was an action of EJECTMENT, tried before PERSON, Judge, at the Fall Term, 1856, of Alamance Superior Court.

Plaintiff's lessor claimed title of the land in question, by virtue of an execution sale to him, as the property of Thomas Davis. He showed a judgment, an execution tested at March Term, 1848, and a sheriff's deed, dated March, 1849.

The defendant produced, in evidence, two deeds, covering the land in question, dated on the 12th of April, 1845. It was proved, by the subscribing witness, that these deeds were drawn by him, at a place some six miles distant from where Davis lived, and signed and sealed by him, on the day they were dated, but that he, Davis, carried them off. They were certified to have been acknowledged at February Term, 1846, of Orange County Court. There was no evidence that these deeds were out of the possession of Davis, the grantor, before being brought forward for probate.

The plaintiff alleged that these deeds were fraudulent and void as to creditors, and made especially to avoid the payment of a debt due to the lessor as executor; and amongst other things, he proposed to prove declarations of the said Davis, made in May, 1845, that he had left the county of Orange and gone into Chatham to avoid being sued for this debt, and other declarations made at the same time, tending to show such fraud. This evidence was objected to by the defendant's counsel, and ruled out by the Court. Plaintiff's counsel excepted.

Verdict for the defendant. Judgment and appeal.

Graham, for plaintiff.
Norwood and *Bailey*, for defendant.

Battle, J. The delivery of a deed is the final act of its execution. It is that which gives it force and effect, and without which, it is a nullity. When a deed is said to be executed, the meaning is, that, with all the other requisites, it has been delivered by the one party to, or for, the other. The date of a deed which is proved to have been delivered at the same time, is *prima facie* evidence that it was executed on that day; *Lyerly* v. *Wheeler*, 12 Ire. Rep. 290. This evidence may be rebutted, by proof that it was not delivered on that day, and its execution must then be referred to the time when the testimony shows that the grantor parted with the possession for the purpose of giving effect to it, and in such a man-

ner as to deprive him of the right to recall it; *Baldwin* v. *Maultsby*, 5 Ire. Rep. 505; *Roe* v. *Lovick*, 8 Ire. Eq. Rep. 88; *Kirk* v. *Turner*, 1 Dev. Eq. Rep. 14. In the case before us, the testimony of one of the subscribing witnesses, shows clearly, that the deed from Davis to the defendant, was not delivered to the grantee or to any person for him, at the time when it was signed, sealed and attested; and there is no proof that it was ever afterwards out of the possession of Davis, until he acknowledged it in the County Court, for the purpose of having it registered. That act was a delivery, (*Snider* v. *Lackenour*, 2 Ire. Eq. 360,) but it was a delivery, making the instrument operative as a deed, as in other cases, from that time only. The testimony of the witness, who was called to prove the declarations of Davis, as to the purpose for which he left the county of Orange, and went into Chatham, related to a time anterior to this, and the declarations were, therefore, competent against him, and those who claimed under him, and it was error in the Court to reject them. For this error the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

JOHN HAILEY *vs.* BENJAMIN WHEELER, EXECUTOR.

No action can be maintained against an executor, as executor, for money had and received by him, after the death of the testator.

Where the plaintiff declared against the defendant, as executor, for money had and received by him, as executor, the defendant may either demur for the badness of the count, or he may move for a nonsuit, or claim a verdict on the trial of the general issue, because the allegation has not been proved; and the principle is not varied by the fact, that the allegation, in its nature, is not susceptible of being proved.

ACTION of ASSUMPSIT, tried before BAILEY, Judge, at a Special Term, November, 1856, of Granville Superior Court.

The plaintiff declared, *first*, upon the following special contract between himself and the defendant's testatrix, viz., the plaintiff was to perform such work upon the farm of defendant's testatrix as she should require of him, and attend, generally, to all the business on her farm, and, as a compensation, was to have the privilege of preparing a lot on said farm, and cultivating the same in tobacco for himself.

Secondly. He declared on the common count for money had and received by the testatrix for plaintiff's use.

Thirdly. For money had and received by the defendant, as executor, to plaintiff's use.

The defendant pleaded the general issue.

On the trial, it was admitted that defendant's testatrix died in the month of February, 1853. It was proved that the testatrix owned a small farm, on which she resided, and the defendant lived with her, and that while so residing together, the contract, as alleged in the first count, was made between them; that in the year 1852, the plaintiff, in pursuance of such contract, attended to, and managed all the business of the farm, and did such work as the testatrix required of him; that during that year, he cultivated for himself, and on his own account, a lot in tobacco; that he cut, cured and housed the tobacco, in his own barn, on the premises, which the testatrix never claimed, nor interferred with; that after the testatrix's death, the defendant, as her executor, seized and sold the tobacco in question, as a part of her estate, without the plaintiff's consent.

His Honor instructed the jury that, according to the evidence, in the case, the plaintiff was not entitled to recover upon either count of his declaration. Plaintiff excepted.

Verdict for the defendant. Judgment and appeal.

Miller, for plaintiff.
Graham and *R. B. Gilliam*, for defendant.

Pearson, J. The plaintiff, beyond question, may waive the tort committed by the defendant, and maintain an action

for money had and received. But in that action the declaration would be in the *debet* and *detinet*, upon a promise of the defendant personally; whereas, in this action, the declaration is in the *detinet* only, upon the promise of the defendant in his representative capacity as executor, to which he may plead "fully administered," and upon which the judgment would be *de bonis testatoris*. We concur with his Honor. The evidence does not support the allegation. There is a fatal variance between the *allegata* and *probata*.

No authority is found to support the position that an action can be maintained against a defendant, as executor, for money had and received by him, after the death of the testator. It would do violence to all principle. It is the duty of an executor to pay off the *debts of his testator* in a prescribed order. It is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time. If an executor make an express contract in reference to the property of the estate,—as if he employs one to cry the sale of the property as auctioneer,—this is not a debt of the testator. It is true, when a testator has entered into a contract, and the breach does not take place until after his death, i. e., a covenant of quiet enjoyment, or where a surety is compelled to pay money after the death of the principal in a suit against the executor, these may be considered debts of the testator, because they had their origin or inception in his life-time. But, in our case, the testatrix set up no claim to the tobacco, and did not interfere with it in any way. So, the act of the defendant in selling it and receiving the money, cannot make it a debt of his testatrix.

Mr. Miller, for the defendant, insisted that, supposing this to be so, the objection could not be taken at the trial, and could only be made upon demurrer, or motion in arrest of judgment for a misjoinder.

The three counts in the declaration are all against the defendant, as executor; so, there is nothing wrong upon the face of the proceeding. If the third count had been against the defendant personally, the misjoinder being apparent on

the record, could only be taken advantage of by demurrer, or motion in arrest; for, upon the trial, the proof would have supported the allegation. But the third count is, like the other two, against the defendant, as executor. So, all is right upon the face of the declaration, and the variance between the allegation and proof only appears at the trial, in which case the proper course is to nonsuit the plaintiff, or, if he will not submit to it, to direct a verdict to be entered against him on the general issue, because the proof does not entitle him to recover.

Mr. Miller then insisted upon the authorities of *Ashby* v. *Ashby*, 7 Barn. and Cress. 444, (14 E. C. L. R. 77,) that, although the third count is against the defendant, as executor, yet, being for money had and received by the defendant, it is bad on its face; because it is impossible that he could have received it as executor, so as to make it a debt of the testator, and objection may be taken on demurrer; and his position is, that as this was a good ground for demurrer, it follows that advantage cannot be taken of it at the trial.

The case cited supports the position that this defect was a good ground of demurrer; so, his premise is true, but his conclusion is a *non sequitur*. If the defendant does not demur for a defect of the kind of which we are speaking, and at the trial the plaintiff proves his allegation, he will be entitled to a verdict, and the defendant will be put to a motion in arrest. But if, at the trial, the plaintiff fails in his proof, there can be no reason why he should not be nonsuited, or have a verdict against him. By way of illustration—a declaration has a count in debt, and also one in trover; the defendant pleads the general issue; if the plaintiff proves his allegation he will be entitled to a verdict, but if he fails in his proof, of course there will be a verdict against him. So, in our case, if the defendant had supported his allegation by proof, he would have been entitled to a verdict, but as he failed in his proof, the verdict was properly against him. The fact that it was perfectly impossible for the plaintiff to prove his allegation, (which is the ground upon which it is held, in *Ashby* v.

Ashby, that the defendant may demur,) although the count is against him as executor, furnishes no reason, whatever, why the defendant should be obliged to demur, under the penalty of thereby entitling the plaintiff to a verdict without proof. It is very certain, upon the reason of the thing, that the defendant may take either course, and the plaintiff cannot, by alleging matter which it is impossible to prove, take from the defendant his right to plead by way of traverse, and force him to demur, and thereby admit the truth of matter which cannot be true. There is no error.

PER CURIAM. Judgment affirmed.

ELIZABETH HATCHELL *vs.* WILLIAM KIMBROUGH.

Where a person had rented a place to another to make a crop, in which they were to go halves, the owner furnishing a horse, it was *Held* to be a tenancy, and the tenant might bring trespass against his landlord for forcibly entering and breaking his close.

Where the loss of an eye was the direct and immediate consequence of exposure to which the plaintiff was subjected by removing the roof of his house, it was *Held* that it might be considered by the jury in aggravation of damages in the action of trespass, q. c. f.

This was an ACTION of TRESPASS, q. c. f., tried before PERSON, J., at the Fall Term, 1856, of Caswell Superior Court.

The declaration alleged a trespass in breaking the defendant's close, and tearing away the roof of her house, *by which* she was exposed to intense cold, which caused her much suffering and disease, and resulted in the loss of one of her eyes.

The proof was that the defendant caused his slaves to go to the house in which the plaintiff lived with her children, and throw off the roof of the house, and haul it away in his wagon; that very severe weather ensued shortly thereafter; that on the same evening, it commenced snowing, and the plaintiff got some rails and laid them on the joists, upon which she

spread some quilts to keep out the snow; that the ground remained covered with snow for three or four weeks; that soon after the roof was taken off the plaintiff took a cold which fell into her eye, which was lost by the effect of the disease.

The plaintiff proved further, that the house and plantation around it had been rented to the plaintiff for the year; that she was to pay as rent one half of the crop, and that the defendant was to furnish a horse towards helping to make it.

The Court charged the jury, that if the evidence was true, the action was properly brought, and the plaintiff was entitled to recover.

As to damages, his Honor instructed the jury that, if they were satisfied that the plaintiff took cold, and the loss of her eye was the direct and immediate consequence to which she was subjected by having the roof of her house taken off, it was proper to consider that in aggravation of the damages. The defendant's counsel excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

S. P. Hill and *Bailey*, for plaintiff.
Morehead, for defendant.

Pearson, J. 1. The action was well brought. The plaintiff was in possession as lessee for years. The circumstance that the defendant, who was the lessor, furnished the plaintiff with a horse, had no other effect than to entitle him to a larger part of the crop as rent. It did not alter the relation of landlord and tenant, or affect, in any way, the right of the plaintiff to the exclusive possession. The doctrine in regard to a cropper has no application. *Ross* v. *Swearingen*, 9 Ire. Rep. 481.

2. If the plaintiff was not entitled to recover in this action for the loss of her eye, in aggravation of damages, she could not recover for it at all. The defendant committed but one wrongful act, i. e., breaking the plaintiff's close and carrying off the roof of the house. Of course the plaintiff could bring

but one action. *Fetter* v. *Beale*, 1 Ld. Raymond's Rep. 339, 692; 1 Salk. R. 11; *Hodsoll* v. *Stallebrass*, 9 Car. and Pa. 63, (38 E. C. L. R. 35,) and other cases cited in *Moore* v. *Love*, 3 Jones' Rep. 215, where the matter is fully discussed.

As the loss of the plaintiff's eye is found by the jury to have been the "direct and immediate consequence of the exposure to which she was subjected by having the roof of her house taken off," it was clearly proper that it should be considered in aggravation of damages. *Welch* v. *Piercy*, 7 Ire. Rep. 365. "Every one is presumed, in law, to intend any consequence which naturally flows from an unlawful act, and is answerable for the injury." Accordingly it is there held, that in trespass, q. c. f., for letting down the plaintiff's fence, he could aggravate the damages by proof that his hogs got out and were lost. So, in an action of this kind, the plaintiff may, in aggravation, show that the defendant debauched his daughter. All injuries of the sort are included under words *alia enormia*.

PER CURIAM. Judgment affirmed.

ELIZABETH JOURNEY *vs.* C. A. SHARPE *et al.*

What is an arrest, is a matter of law. Whether an arrest was made in a particular case, is a matter of fact depending on intention, and is to be decided by the jury.

This was an ACTION of TRESPASS and false imprisonment, tried before his Honor, Judge BAILEY, at the Fall Term, 1855, of Iredell Superior Court.

To prove the arrest, the plaintiff introduced the constable who acted in the case. He stated that the instrument produced, which purported to be a warrant, but which had no seal, and, in fact, charged no offense known to the law, was sued out by the defendant Sharpe, and placed in his (witness')

hands to be executed. He went to the house where the plaintiff resided, rode up to the gate on horseback, and sent for her to come into the porch. She did so, and witness informed her that he had a warrant against her; to which she replied that she had expected such a thing. He then told her that she must go, two days thereafter, to the house of a man by the name of Keaton, about two miles distant, to attend her trial before a magistrate; which she agreed to do The officer did not dismount from his horse, nor come within the enclosure of the house where plaintiff was, during the time of this conversation, nor did she leave the porch.

The magistrate, the defendants, the officer and witnesses, attended at the store-house of Keaton, about one hundred and fifty yards from his dwelling, where the plaintiff was. At the suggestion of Keaton they went to the dwelling-house, where the matter was taken up. The magistrate stated that the warrant was void, and the proceedings might be stopped. The defendant Sharpe, said he would get another warrant. The plaintiff then waived all objection to the warrant; the magistrate proceeded to investigate the charge and dismissed the warrant. The examination lasted an hour, or an hour and a half, during which time the plaintiff occupied a seat in the apartment, and was in the presence of the officer the whole time.

On these facts his Honor ruled that there was no arrest. In deference to which opinion, the plaintiff took a nonsuit and appealed.

Boyden, for plaintiff.
Osborne, for defendants.

Nash, C. J. A single question is presented by this case: Did his Honor err in his instructions to the jury? The defendant was sued for the acts of a constable, and there had been put into his hands, by the defendant, a paper writing signed by a magistrate, purporting to be a warrant against the plaintiff. He went to her house, and without getting off

his horse, or going into the yard, told her he had a warrant against her. She replied that she expected such a thing. He then directed her when and where to attend the trial, which she promised to do, and did. His Honor instructed the jury this was no arrest. In this there is error. An arrest is simply taking the body of an individual by an officer, under legal process; but it has been decided that, to constitute an arrest, it is not necessary for the officer to touch the person. It is sufficient if, being in his presence, he tells him he has such a precept, and the person says, "I submit to your authority." So, if the officer does touch the individual, it may, or may not, amount to an arrest, according to the intention with which it is done. Where a transaction takes its character from the intention of the parties, this intent is a matter of fact to be submitted to the jury. Here there was no touching; the whole transaction was of an equivocal character, depending on the intent of the parties, and ought to have been submitted to the jury with proper instructions. *Jones* v. *Jones*, 13 Ire. Rep. 418.

It was said in the argument, that the officer's return was *prima facie* evidence that he had made the arrest. Be that as it may, it is not important in the view we have taken of the case before us. In *Bland* v. *Whitfield*, 1 Jones' Rep. 123, the same defense was made as to a sheriff's return upon an execution levied upon property; the Court say the return upon the execution is *prima facie* evidence in the proceedings of which it forms a part; whether it is also *prima facie* evidence in another and a different proceeding or action, may well "be questioned."

Again, it is said, "supposing the return to be *prima facie* evidence that a levy was made, it remains an open question whether the officer did, or did not, lay hands on the property, &c." In this case, the return made by the officer is 'executed.' If the paper writing, under which the officer acted, had been a legal precept, still the return would have left the question an open one as to whether the officer had actually taken the body of the defendant mentioned in the precept, or whether

the circumstances disclosed were *intended* by the parties as an arrest. We have seen that, in the latter case, the efficiency of the act was a question of fact for the jury. But his Honor took the whole case from the jury, and considering it a question purely of law, charged that no arrest was proved. What is an arrest, is a question of law. Whether there has been an arrest, under particular circumstances, depending on the intent, is a question of fact. See *Jones* v. *Jones*, supra—same case, 1 Jones' Rep. 491. There is error. The judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

AUGUSTUS GWYNN *vs.* SUSAN M. HODGE.

A party made a bill of sale of personal chattels in the ordinary form, and there was a parol agreement made at the same time, that the articles should be delivered on a given day, which was not done; *Held* that the title to the property passed from the date of the conveyance, notwithstanding the parol agreement.

The owner of a bond on an individual, with a surety to it, endorsed it without recourse upon the endorser, as the consideration for property bought of the endorsee, having first cut the surety's name from the bond; it was *Held*, that the endorsement amounted to a valid consideration in the contract of purchase.

A deed is good in a Court of law, notwithstanding any fraud in the consideration of it, or in the false representation of a collateral fact which induced the party to enter into it. It is only fraud in the *factum*, which will amount to a defense in a Court of law.

ACTION of TROVER, tried before DICK, Judge, at the Spring Term, 1856, of Caswell Superior Court.

The plaintiff claimed title to the property in question, which consisted of a carriage and horses, with some other articles of personal property, by virtue of a written transfer, which was lost. It was proved to have been in the ordinary form of a bill of sale, and the consideration of it was the endorsement,

to the defendant, of a bond payable to George W. Swepston by one Russell, to which the name of plaintiff's wife had been signed as surety while a feme sole, but which was then and there cut off by consent of the parties. This endorsement was made without recourse to the endorser. As a further consideration to the bill of sale, Swepston, as agent for plaintiff, made a release to the bargainor of all claim which he (plaintiff) might have against defendant, for having fraudulently removed said Russell out of the county. The property was not delivered when the bill of sale was executed, but by a parol agreement, made at that time, it was to be delivered on a given day, which, on demand, was refused.

The plaintiff employed Swepston to manage and negotiate with Mrs. Hodge for his indemnity against the bond. Evidence was introduced, tending to show, that Swepston alarmed the defendant, by falsely representing to her the extent of her liability for Russell's debts, and by other false statements, and by threatening to levy an attachment on her property; and had thus induced her to sign the bill of sale above referred to.

The defendant contended, first, that no such right passed by the written transfer, accompanied with the parol agreement, as would enable the plaintiff to sustain this action.

Secondly. That there was no consideration.

Thirdly. That there was such a fraud practiced by plaintiff's agent, on the defendant, as to render the conveyance void.

His Honor was requested to instruct the jury according to these several positions, but declined to do so, and the defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Hill and *Moore*, for plaintiff.
Morehead, for defendant.

Battle, J. We cannot discover any error among those assigned in her bill of exceptions, which entitles the defendant to have the judgment reversed, and a *venire de novo*

awarded. Divested of its complications, the case made for the defendant is simply this, that she was prevailed upon by what she alleges was the fraudulent representations of the plaintiff's agent, to execute a bill of sale for the carriage, horses and other personal chattels in question, and that she afterwards refused, upon demand, to give them up. The bill of sale is lost, and is, therefore, not before us; but the parties admit that it was in the ordinary form, and as such, it operated to pass the title from the time when it was given. Blackburn on Sales, 150 et seq., 57 Law Lib. 80. The transfer of the bond, to say nothing of the release, was undoubtedly a sufficient consideration for it, whether the cutting off the name of the surety to the bond made that void or not; for if it were of no value to the defendant, it was at least a prejudice to the plaintiff, to be deprived of it.

The objection, that the bill of sale was obtained by means of the fraudulent representations of the plaintiff's agent, cannot avail in a Court of law. It is well settled, that a deed is valid in that Court, notwithstanding any fraud in the *consideration* of it, or in any false representation of a collateral fact, whereby the party was induced to enter into the contract by executing the instrument. *Gant* v. *Hunsucker*, 12 Ire. Rep. 254; *Reed* v. *Moore*, 3 Ire. Rep. 310. It is only fraud in the *factum*, which can be relied on as a defense at law; while fraud, in the *consideration*, is left to be enquired of, and relieved against, in Equity. *Logan* v. *Simmons*, 1 Dev. and Bat. Rep. 13. As we do not find any error in the record, the judgment is affirmed.

Per Curiam. Judgment affirmed.

JOHN W. PURVIS, ADM'R., TO THE USE OF J. S. COLEMAN, *vs.* JAMES C. ALBRITTON, EX'R. OF LUKE ALBRITTON.

Where a subscribing witness to a bond, having purchased the interest there-

in without endorsement, sold the same without endorsement, on a credit, with the avowed purpose of making himself competent to testify, and states that it was, at the time of the trade, and still is, his purpose, not to make his vendee pay for the bond, unless he can recover it, but says there was not any understanding to that effect between them in the trade; *Held* that he is legally admissible.

Action of debt, tried before his Honor, Judge Saunders, at the Fall Term, 1856, of Pitt Superior Court.

The action was brought on a bond, originally for $100, payable to one Jason Purvis, dated in 1842, on which there was a credit of $53,90, dated 9th of January, 1843.

William W. Sherrod, the subscribing witness, proved the execution of the bond by the testator of the defendant, and that in the latter part of the year 1843, (the credit being then endorsed,) he bought it from Purvis, the payee, but took no assignment of it in writing. Before making the purchase, he informed defendant's testator (who had been his guardian) of his intention to do so, and was advised by him to do it. Afterwards, in 1847, he informed the testator, that he had purchased the bond, though he did not show it to him, when he expressed himself as being gratified that he had got it. Defendant's testator died in 1853, and more than ten years had elapsed from the date of the credit, on the note, to the death of the testator. After this latter event, the witness says, he was informed, for the first time, that it would be presumed, in law, to be paid, from the length of time, and he sold it to John S. Coleman, and took his note in payment for it. Witness did not inform Coleman of defendant's refusal to pay, or that there was any difficulty about collecting the bond. At the time of this trade with Coleman, it was not his purpose to make him pay the note which he received from him, unless he should succeed in collecting the bond in question, and that his object in selling to Coleman, was to enable himself to testify in the case; but there was no understanding between him and Coleman that he was not to enforce their bargain, or that witness was to be liable to him in any way, and that he had no interest in the event of the suit. Witness said, no

part of the bond had been paid to him, and defendant's testator was a man of large property all the time he had it, and at his death.

The evidence of the witness was objected to, but admitted by the Court. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

Rodman, for plaintiff.
Batchelor, for defendant.

BATTLE, J. The admission made by the defendant's testator to the subscribing witness, that the bond had not then been fully paid, was sufficient to rebut the presumption arising from the lapse of time, and the only question is, was he, under the circumstances, competent to testify? We certainly think that he came before the Court with a cloud of suspicion resting upon him; but after much reflection, we are satisfied that the objection to him went to his credibility, and not to his competency. It is conceded that, at the time of the trial, he had no legal interest in the negotiable instrument sued upon. He had indeed theretofore purchased it, but had taken it without endorsement, and thus had an equitable one only in it. He, afterwards, for the very purpose of enabling himself to become a witness, assigned his interest to a third person and took the note of that person in payment of the price. After that time, he had neither a legal nor equitable interest in the bond, and though he had mentally resolved not to enforce the payment of the note taken from his vendee, unless the latter should recover the bond, that created a moral duty only; one which could not be enforced either at Law or in Equity. This, it is now well settled, did not render him incompetent. 1 Greenl. Ev. 388, 430; 2 Phil. Ev. 99, note 92. The case of *Perry* v. *Fleming*, 2 Car. Law Repos. 458, was, in some respects, like the present. It was an action of debt upon a bond, to which *non est factum* was pleaded. The subscribing witness to the bond had, soon after its execution, purchased it, but without endorsement; but in order to restore

his competency as a witness, he signed and sealed a release of all his right to Perry, the plaintiff, and deposited it in the clerk's office for his use; he, the plaintiff, not being at Court. Under these circumstances, the witness was allowed to prove the execution of the bond; which was afterwards approved by the unanimous opinion of the Supreme Court. The case of *Billingsly* v. *Knight*, N. C. Term Rep. 103, shows too, that if the subscribing witness to a negotiable bond, becomes the assignee of it by endorsement, he may restore his competency as a witness, by endorsing it to another person without recourse and taking a release from that person.

These cases clearly establish the principle, that a subscribing witness to a negotiable instrument, who acquires, by his own act, an interest therein, either legal or equitable, may divest himself of that interest, and thus restore his competency to testify in regard to it. Having neither a legal nor an equitable interest in the event of the cause, the law will not reject him as a witness, because he may feel himself under an obligation of morality or honor, not to suffer the party for whom he is called, to lose by the result of the suit.

PER CURIAM. The judgment is affirmed.

JOSEPH WALDO AND COMPANY *vs.* LEVIN JOLLY.

Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars, the plaintiff can omit, or give credit for, any items he may choose, so as to bring the case within the jurisdiction of a single magistrate.

Where there is but one item of dealing, which goes beyond sixty dollars, this cannot be done.

The plaintiff cannot, however, after thus obtaining jurisdiction, prove the account under the book-debt law; for under that, he has to swear that the account sued on contains a full statement of all their dealings.

This was an ACTION of ASSUMPSIT, begun by warrrant, and

brought up to the Superior Court of Martin, where it was tried before SAUNDERS, J., at the Fall Term, 1856.

The only question in the case was, whether, on an account containing various particulars amounting, in all, to more than sixty dollars, items could be credited so as to bring it within the jurisdiction of a single justice of the peace; the credit being entered for that purpose only.

His Honor, upon this question, was of opinion with the plaintiff, and gave judgment accordingly; from which the defendant appealed.

Winston, jr., and *Donnell*, for plaintiffs.

No counsel appeared for the defendant in this Court.

NASH, C. J. The action commenced before a single magistrate upon an account for sixty dollars; the account was, originally, for $72,95, but upon it was a receipt for $12,96, leaving the amount claimed, as stated in the warrant. On the argument it was insisted that the account, in its legal character, was one, and could not be cut up, without the assent of the defendant, into different parts, so as to bring it within the jurisdiction of a justice of the peace.

We do not agree to the proposition. It is not true in law. Where an account consists of divers dealings of the parties at different periods of time, each dealing is a several transaction, and an action may be maintained on each. Thus, if a merchant has a store and black-smith shop, although the accounts are kept in the same book, he may bring an action upon each separately.

If there be but one dealing, as the sale of a horse at $75, the plaintiff cannot give a single justice jurisdiction, by entering a credit; but where there are separate and distinct dealings, the plaintiff may warrant upon such portion of the account as he may elect, and introduce any number of the dealings he thinks proper. In the latter case the statute of limitations runs from the date of each dealing. See *Green* v. *Caldcleugh*, 1 Dev. and Bat. 320.

This doctrine does not apply to actions under the book-debt law, when the plaintiff sustains his action by his own oath; because the plaintiff has to swear that the account rendered contains a true account of all the dealings.

We hold that the plaintiff in this case had a right to this action, without reference to the credit entered on the account, and that the magistrate had jurisdiction.

PER CURIAM. Judgment affirmed.

JOHN W. GARRARD *vs.* WILLIAM G. DOLLAR.

In an inquest of damages upon a judgment by default, nothing that would have amounted to a plea in bar to the cause of action, can be given in evidence to reduce the damages.

The measure of damages against a vendee for refusing to perform his contract for the purchase of land, (the vendor having offered to do all that the contract required of him,) is the purchase money with interest.

This was an ENQUIRY of DAMAGES upon a judgment by default, tried before PERSON, J., at the Fall Term, 1856, of Orange Superior Court.

The plaintiff offered in evidence a writing, under the hand and seal of the defendant, as follows, viz:

"This certifies that John W. Garrard and William G. Dollar, of the County and State above named, have made the following contract and agreement, to wit: That the said Dollar has purchased of the said Garrard, a certain parcel or tract of land, known as Peter's Cross-roads, at ten dollars per acre, and the line as follows, (describing the same by metes and bounds.) The said Dollar agrees, when the amount of the land is ascertained, to execute to the said Garrard, his bonds with approved security, divided into three parts equally, and payable as follows: first bond, payable Jan. 1st, 1856; second bond, payable January 1st, 1857; and the third bond,

payable January 1st, 1858; all bearing interest from date. The said Garrard agrees to give said Dollar possession the 1st day of October next." Dated 31st of August, 1855. He further proved that he and the defendant had the land surveyed before the suit was brought, and there were 287 1-4 acres; and that defendant refused to give his bonds.

The defendant offered the evidence of *Cadwallader Jones, jr., Esq.*, that, at the date of the covenant sued on, he was the owner of the land, but that, before that time, he had contracted, in writing, to sell it to the plaintiff, and to make title whenever the purchase money was paid. Plaintiff's counsel objected to the admissibility of this evidence, but the objection was overruled, and the testimony received. Plaintiff excepted. Mr. Jones proved further that, since the alleged breach of the contract, the whole of the purchase money had been paid to him, and that during the week (then current) he had executed to him a deed for the premises in fee simple.

The plaintiff then produced and offered to file a deed to the defendant as an escrow, to take effect upon the payment of the price agreed upon for the land.

The jury found the following special verdict: "That the defendant covenanted with the plaintiff to give his bonds for 287 1-4 acres of land, at $10 per acre, and they assess his damages at $2872,50, unless their further finding, to wit, that at the time of the breach of the said covenant, the plaintiff had no title to the land, but the same was, and continued in Mr. Jones, until the present term of this Court, ought, in law, to be taken in mitigation of damages; and if it ought so to be taken, they assess the plaintiff's damages at 6 pence."

Upon consideration whereof, the Court gave judgment for the plaintiff for six pence and costs; from which the plaintiff appealed.

Norwood, for plaintiff.
Turner and *Miller*, for defendant.

BATTLE, J. We are clearly of opinion that the judgment by default precluded the defendant from using, for the purpose of reducing the damages, testimony which would have defeated the action, had a plea in bar been put in. A default admits all the material averments properly set forth in the declaration, and, of course, everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible. 2 Sellon's Practice, 25; *DeGaillon* v. *L'Aigle*, 1 Bos. and Pul. Rep. 368; *East India Company* v. *Glover*, 1 Stra. Rep. 612; *Foster* v. *Smith*, 10 Wend. Rep. 356. In the case last cited, which was an action of trespass for false imprisonment, the principle upon which the rule is founded is well explained. "The evidence," says NELSON, J., in delivering the opinion of the Court, "would have been inadmissible under the general issue in justification, without notice or special plea, were it not for the provisions of the statute for the more easy pleading of public officers, and those acting in aid of them, and the reasons given are to prevent surprise upon the plaintiff on the trial, and to enable him to meet the defendant upon equal terms with respect to the evidence. 1 Chitty's Pl. 493. These reasons are equally strong against allowing the evidence without notice, in mitigation of damages; besides, the inconsistency of hearing evidence in contradiction of the legal effect of the record, which is not pertinent to any issue presented by it. If this practice were tolerated, it would enable defendants to have substantially the benefit of a justification in every case in which evidence could be procured to establish it, without notice to the plaintiff of such defense; for if admissible, and the justification should be proved, the least effect that could reasonably be given to it would be to reduce the inquest to nominal damages. This would be the standard of damages in all cases upon such proof." These reasons seem to us to be unanswerable when applied to the action of trespass, and they are not less cogent in their application to the present action of covenant for a breach of a contract under seal. If the

testimony which would have defeated the action upon a plea in bar, be admitted in mitigation of damages upon the defendant's default, it will give him the great advantage of repudiating his contract upon the payment of nominal damages, for no second action can be brought upon it.

But if the defendant had pleaded, and thereby given the plaintiff notice of his ground of defense, the latter might have submitted to a judgment of nonsuit, and, afterwards, brought another action when he had done what was necessary on his part to enable him to sustain it. On an enquiry of damages, then, upon a default, all the material allegations of the plaintiff's declaration are to be considered as admitted by the defendant to be true, and the only question will be, what is the rule of damages in the particular case? If the damages be, in their nature, uncertain, as in many of the forms of action they will be, then the amount will have to be ascertained by the proofs which each party may be able to produce. If they are certain, or, by computation, capable of being reduced to a certainty, then there will be little or no room left for proof. In the case before us, the defendant covenanted to pay a certain price *per acre* for a tract of land, the number of acres of which, was to be ascertained by a survey. It was so ascertained, and the sum agreed on to be paid was thus reduced to a certainty. That sum the plaintiff is entitled to recover as damages, unless it be the rule that a vendor of land, after doing everything he can towards the fulfilment of his part of the contract, can recover from the defaulting purchaser nominal damages only. This is an important practical question, and upon it the decisions of Courts in different countries do not seem to be uniform. In England, it is said, that when the vendee refuses to perform, the measure of damages is held to be the difference between the price fixed in the contract and the value at the time fixed on for the delivery of the deed; so that if the property does not fall in value, the vendor can get nothing but nominal damages. Thus, in the case of *Laird* v. *Pim*, 7 Mee. and Wels. Rep. 474, where an eminent Judge, Baron Rolfe, (who is now the

Lord Chancellor CRANWORTH,) had, at the trial, restricted the vendor to nominal damages, the Court of Exchequer, on the argument of a rule to show cause why the damages should not be increased to the amount of the purchase money, said, "The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too." There are, indeed, some prior English cases which seem to have held a contrary doctrine. *Goodisson* v. *Nunn*, 4 Term Rep. 761; *Glazebrook* v. *Woodrow*, 8 Term Rep. 366. In Vermont the rule, as laid down by the Court of Exchequer, was recognized. *Sawyers* v. *McIntire*, 18 Vermn. Rep. 27. A different rule prevails in Maine, (*Aland* v. *Plummer*, 4 Green. Rep. 258,) and in New York, (*Shannon* v. *Comstock*, 21 Wend. 457; *Williams* v. *Field*, stated shortly in a note to page 192 of Sedgwick on Damages). Mr. Sedgwick says, that "the question is evidently not free from perplexity. On the one hand, it is said that the vendor, by making a tender, has performed his contract so far as it lies in his power; that his right is complete to the performance of the contract by the vendee, and that this performance is the payment of the purchase-money. But on the other side, it is replied with great force, that the recovery cannot pass the fee in the land; that the legal seizin still remains as at first; that the vendor has not parted with his property; that, if the land has not fallen in price, he has lost nothing; that the common law gives damages for none but actual loss; and it is insisted that the true measure of damages in such a case is the difference between the stipulated price and the actual value at the time of the breach, or, perhaps, at the time of the trial." Sedgwick on Damages, 191, 192. The author, in a note to the page last referred to, expresses his preference for the latter rule, though he admits that it is different with respect to the sale of personal chattels. See page 281.

The counsel have not referred us to any case in our Court where the rule has been settled. In the absence of an ex-

press adjudication, we feel at liberty to adopt the rule that gives to the vendor the contract price with interest thereon, when he shows he has done all in his power to complete the contract on his part, by making and tendering a deed to the vendee. If a Court of Law cannot take into consideration the fact, that upon the payment of the purchase-money the Court of Equity will compel the execution of a deed by the vendor, it can enforce its own salutary principles, that no person shall take advantage of his own wrong, and will thus prevent an unscrupulous vendee from mocking his innocent vendor by refusing to perform his solemn engagement, and submitting to a judgment for a penny damages.

The judgment given in the Court below, in favor of the plaintiff, for six pence damages, is reversed, and judgment will be entered in this Court in his favor, upon the special verdict, for $2872,50, and also for costs.

PER CURIAM. Judgment reversed.

PASCHAL McCOY *vs* THE JUSTICES OF HARNETT COUNTY.

A *mandamus* to the justices of a County to compel them to do a thing in their public capacity, requires "a return" by them as a body.

Where an *alternative mandamus* was directed to the justices of a County, and one set of them, as individuals, made a return of one import, and another set of them made a return of a different import, no convention having taken place to get the voice of the majority, it was *Held*, that the return was a nullity, and that all the proceedings in the cause, predicated on it, were erroneous.

An appeal by one set of the magistrates in the above case, was held to be proper.

This was an application for a MANDAMUS, to be directed to the justices of Harnett County to compel the fulfilment of a contract made with the petitioner for the building of a Court-House and Jail, heard before PERSON, Judge, at a Special Term, June, 1856, of Cumberland Superior Court.

At the Term of the Court to which the writ was returnable, an informal statement, entitled "a return," was filed by Geo. W. Pegram, Esq., and several other justices of the peace for Harnett County, admitting the justness of the petitioner's demand, and alleging their entire willingness to pay the same; at the same time another statement was made by Robert C. Belden, Esq., and other justices of the peace of that County, denying the justness of the claim, and giving reasons *in extenso* why they had refused to pay the same; neither of these statements being in fact, nor purporting to be, the return of the justices of the County as a body.

A motion was made that the return of R. C. Belden and others be quashed; which motion was allowed.

A motion was then made, on the other side, that R. C. Belden and others have leave to amend their return; which was also allowed.

His Honor proceeded further to consider the case, and ordered a peremptory mandamus to issue; from which judgment R. C. Belden and his associates appealed to the Supreme Court.

Haughton, for plaintiff.
J. Winslow, *B. Fuller*, and *McKay*, for defendants.

Pearson, J. A mandamus to "the justices of a County" issues against them as *a body*, and not as separate individuals; so they must make "a return" as a body. To this end, it is proper for the justices to convene, and a majority being present, as for the transaction of any other County business, to agree upon the facts which are to be set out for their return. In this, as in other cases, a majority of those present will govern. They will then appoint some one of their body, who, as their agent, is to make the proper affidavit, and do all other acts and things which may become necessary in the course of the proceeding.

This was the course pursued in *Tucker* v. *The Justices of Iredell*, 1 Jones' Rep. 451, where the Court say, "Both the

petition and return are well drawn for the purpose of putting the matter of controversy upon the merits, and may be used as forms," and accordingly the Reporter sets out the petition and return at large.

In that case issues were made up upon "the return," and thereupon, the Court was enabled to decide the controversy. In this case there is no return made by the justices as a body. G. W. Pegram, Esq., and several others of the justices, unite in making what is termed their return: and Robert C. Belden, Esq., and several other justices, unite in making what is termed *their return*; so, there are two inconsistent and repugnant returns, neither being, nor purporting to be, in fact, the return of the justices of the County as a body.

There is, in effect, no return, and nothing upon which the Court could rightfully take any action; consequently, it was error in the Court to proceed and order a peremptory mandamus. The proper course was to direct both of the so-called returns to be withdrawn from the files, and to require the justices to make a return as a body; in analogy to the order directing a "repleader," in an ordinary action where, when the pleadings terminate in an immaterial issue, or upon a traverse which is too narrow, the Court directs the parties to begin anew—commencing at the first wrong step.

The order appealed from must be reversed, and this opinion will be certified, to the end that there may be a proper return, so as to enable the Court to decide the matter in controversy.

It was insisted in the argument, that the case was not properly in this Court; for, that a part of the justices, only, appealed, which they had no right to do. The justices who appealed had been recognised as distinct and several parties to the proceedings, and, as such, were required to make a return, although certain others of the justices had made what is called their return. This destroyed the unity of the action which the nature of the proceeding requires, and entitled these parties to the right of taking an appeal, for the purpose of having corrected the error into which the Court had fallen by

not requiring the return to be made by the justices as a body; by reason of which error all further proceeding in the premises was made impracticable.

Several points were mooted in the interesting argument with which we were favored, that it is not necessary to advert to; but as the case is sent back, it may be well to state the positions that seem to be sustained by the authorities, and our practice:

1st. The return is a waiver of all the objections to the petition and writ, treating it as mesne process, which go to the form, and not to the substance.

2nd. Although, according to the practice in England, the writ not only sets out distinctly all that the party is commanded to do, but also all of the allegations upon which the writ is granted, so as to inform the party to what he is to make return, yet, our practice has been to set out in the writ, only what the party is commanded to do, and to send, with the writ, a copy of the petition, so as to inform the party to what he is to make return. This practice seems to have been borrowed from that of the Courts of Equity in respect to injunctions. Both practices are admissible, but ours commends itself upon the score of convenience, from the fact that, with us, the clerks are not usually skillful enough to frame a writ with the recital of the necessary allegations, and a copy of the petition as a part of the writ, although requiring more writing, is less apt to give rise to mistakes.

3rd. The justices being informally apprised of the writ, may, when convened for the purpose of agreeing upon "a return," as a body, accept service of a writ formally drawn up, or of the writ and a copy of the petition, according to our practice, and in this way save the trouble and expense of a writ for each one of the justices.

PER CURIAM. Judgment reversed.

THOMAS DEWEY *vs.* WILLIAM B. COCHRAN.

A note, made payable to "T. D., cashier," negotiable and payable at a particular bank, which is made for the purpose of being discounted at that bank, but is rejected and not discounted, is afterwards sold and delivered by the principal therein, without the assent of the sureties, to a third person; *Held*, that T. D. could not recover against the surety on such note, for the benefit of such third person.

ACTION of DEBT, tried before BAILEY, J., at the Fall Term, 1855, of Cabarrus Superior Court.

The following case agreed, was submitted for the judgment of the Court.

The note declared on is as follows:

"$927,00. CHARLOTTE, N. C., April 13th, 1854.

Eighty-eight days after date, we, Caldwell and Hagins, as principals, and R. T. McEntyre and W. B. Cochran, as sureties, promise to pay to Thomas W. Dewey, Cashier, or order, nine hundred and twenty-seven dollars, for value received. Negotiable and payable at the branch of the bank of the State of North Carolina, at Charlotte." (Signed by the persons named in the note.)

The said note was made on a printed form, prepared by the bank, and according to which, most of the notes discounted were framed, but was in blank as to the amount It was offered for discount by Hagins, one of the principals therein named, to John Erwin, the president of the bank at Charlotte, who informed the party offering it that it could not be discounted. The usual mode of doing business in this bank is, for the makers to offer the note for discount, and it is submitted to a board of directors. If they approve of it, it is discounted by the cashier, and it then becomes the property of the bank. If rejected by the board, the note is returned to the makers, or thrown aside as worthless. After Hagins was informed by the president of the bank that the note could not be discounted, he carried the same to Charleston, in South Carolina, without the knowledge or consent of the sureties, or

either of them, and the firm of Caldwell & Hagins being previously indebted to S. S. Farrar and Brothers, he filled up the blank with the sum of $927,00 and delivered the note to that firm, in discharge of this previous indebtedness. The note was sent to Mr. Dewey by Farrar & Brothers for collection, and when it fell due, at their instance he had it protested for non-payment. Suit was then instituted by Farrar & Brothers, in the name of Thomas W. Dewey, cashier, on the note in question. It is further agreed, that after the conversation with the president of the bank above referred to, the note was not submitted to the board of directors to be passed on; and it is further agreed, that the note was made by the persons signing it, with the view of being discounted at the bank.

Upon this special case it is agreed that, if the Court shall be of opinion for the plaintiff, judgment is to be rendered for $1012,07, of which sum $927,00 is principal money; but if of a contrary opinion, judgment of nonsuit is to be rendered.

On consideration of the case agreed, his Honor, being of opinion with the defendant, ordered a nonsuit; from which judgment the plaintiff appealed.

Osborne and *Boyden*, for plaintiff.
Wilson, for defendant.

Nash, C. J. The action is on a note of which the following is a copy: "Eighty-eight days after date, we, Caldwell & Hagins, as principals, and R. T. McEntyre and William B. Cochran, sureties, promise to pay to Thos. W. Dewey, cashier, or order, nine hundred and twenty-seven dollars. Value received. Negotiable and payable at the branch of the bank of the State of North Carolina, at Charlotte." This note was presented to the president of the proper bank, at Charlotte, when the holder was informed that the bank would not discount it. Mr. Hagins, one of the firm of Caldwell & Hagins, the principals in the note, took it to Charleston, in South Carolina, where he transferred it, by assignment, to S. S. Far-

rar & Brothers, in payment of a debt due them by Caldwell & Hagins.

The action was brought to the County Court of Cabarrus, where judgment was rendered against all the parties to the note. Cochran alone appealed to the Superior Court. Cochran was one of the sureties.

The first enquiry is as to the nature of the contract into which the sureties entered. They bound themselves to pay to Thomas Dewey, or his order, the sum mentioned in the note. To the validity of every contract it is essential that it receive the assent of the parties, to be bound either as payers or performers. Parsons on Contracts, 399. In this case it is not pretended that Thomas Dewey ever accepted the note. On the contrary, the bank, through its president, and whose officer, Mr. Dewey was, refused to receive the note. There is, then, no contract between Mr. Dewey and the defendant. Mr. Dewey has not the legal title to the note. But the action is brought not for the benefit of Mr. Dewey or the bank, but for the use and benefit of Farrar & Brothers, to whom it was assigned by Hagins. Did they, by this agreement, acquire such an interest in the note as to enable them to bring this action in the name of Thomas Dewey, the original payee? We think they did not. The note in question is made payable and negotiable at the branch of the bank of the State, at Charlotte. What is the meaning of the word negotiable? It is admitted that the note is in the usual form of such instruments. Put into plain English, the word negotiable means that the money is to be borrowed from the bank designated. The sureties bound themselves that if the bank would discount the note, they would pay it at maturity; but they do not promise to pay any other holder of the note who does not claim through the bank. Many reasons might exist why they would not be willing to incur that responsibility when they would not be willing to incur it with a private individual. If the note was discounted at the bank, they knew that, after ninety days, they could take up the obligation or refuse to prolong their responsibility by joining in a renewal

of the note, and then the bank might, and would, proceed to collect it. If negotiated to a private individual, years might pass before they knew where it was, or before it was presented for payment, nor could they, until it was presented for payment, know certainly that it was outstanding; whereas, if in the bank, he would know where to go, and he could, at any time after maturity, ascertain whether it had been taken up and discharged by his principal, and, if not, be enabled to secure himself. It never was intended by the defendant that the note should be thrown into market in any other way than as pointed out in his contract. The principle controlling the case is fully stated in *Respass* v. *Latham*, Bus. Rep. 138. That was an action of debt upon a sealed instrument, which was payable to Mrs. Parker. When presented to her she refused to lend the money upon it, and it was returned to the obligors. Subsequently one of the obligors, and for whose use the money to be raised was intended, induced the payee to endorse it without recourse, and the money was advanced upon it by the plaintiff. The Court say, "The instrument, in its original concoction, was not intended by the defendants to be thrown into market to raise funds from any one who would advance them, but from a specified individual, and that person refusing to lend money upon it, it must be shown that the defendants agreed to the new intent, that is, becoming bound to Respass, which does not appear."

In our case, the source from which the money was to be borrowed is specified in the instrument, to wit, the branch bank of the State, at Charlotte; and the bank having refused to discount it, the note, as to the defendant, the surety, died, and could not be revived by a transfer to Farrar & Brothers without his assent. Of all this the beneficial owners were apprised from the face of the note. At any rate, the fact that Mr. Dewey, the original payee, as cashier of the bank, had not endorsed it, taken in connection with the tenor of the note, was sufficient to put them on the enquiry.

According to the case agreed, the Judge below gave judgment of nonsuit, which is affirmed.

PER CURIAM. Judgment affirmed.

JOHN M. INGRAM *vs.* SOPHIA W. INGRAM.

The law presumes that every administrator settles up the estate in his hands within two years. In an action, therefore, on agreement to pay a debt when a certain estate is settled, if two years have elapsed from the date of the administration, the plaintiff has a *prima facie* right to recover, and the burden of showing that the estate was not settled, is thrown on the defendant.

An agreement between persons interested in an estate, the consideration of which is not to bid against each other at the administrator's sale, is against the public policy, and void.

THIS was an action of ASSUMPSIT, tried before ELLIS, Judge, at the Spring Term, 1856, of the Superior Court of Union County.

The action was founded upon the following written instrument, viz:

"Whereas, John M. Ingram, has released to me all his interest in the estate of George W. Ingram, and also agreed not to bid for the property, when sold, upon which I hereby agree to pay him, when the estate of George W. Ingram is settled by the administrator, his claims on the estate of said George W. Ingram, consisting of one hundred and seventy-five dollars for the hire of negroes, due the 1st of January, 1843, for which no note was given; and a note due on the 1st of January, 1842, for one hundred dollars and eighteen cents; also, a note for twenty dollars, due 1st of January, 1836. Given under my hand, May 13th, 1848." (Signed by defendant.)

The defendant pleaded the "general issue," and that the "contract was against public policy."

The execution of the instrument was proved; also, that the administration, on the estate of George W. Ingram, was

granted to one Roland Crump, in April, 1848. The writ, in this case, was issued 10th February, 1854.

The defendant's counsel contended in the Court below, that plaintiff could not recover. 1st. Because he had not proved that the estate of G. W. Ingram had been settled before the suit was brought. 2nd. The contract was against the public policy, and therefore void.

His Honor was of opinion with the defendant on both these points. Whereupon, the plaintiff submitted to a nonsuit and appealed.

Ashe, for the plaintiff.
Osborne, for the defendant.

Battle, J. We do not concur with his Honor upon the first ground of objection taken for the defendant, to wit, that the action was commenced too soon. The law required that the estate should be settled up by the administrator within two years, and the presumption is, that he performed his duty, unless the contrary be shown. This presumption was sufficient to make a *prima facie* case for the plaintiff, and throw the burthen on the defendant of proving that the estate of the intestate had not been settled when the writ was issued.

The second objection is fatal to the action, and upon that, we think that the decision of his Honor was correct. The principle established by the cases of *Sharpe* v. *Farmer*, 4 Dev. and Bat. Rep. 122, *Ramsay* v. *Woodard*, 3 Jones' Rep. 508, and *Blythe* v. *Lovingood*, 2 Ire. Rep. 20, is directly applicable to the present case. It is that "the law prohibits every thing which is *contra bonos mores*, and, therefore, no contract which originates in an act contrary to the true principles of morality, can be made the subject of complaint in the courts of justice." In *Blythe* v. *Lovingood*, the contract was declared to be void, because it was founded upon a consideration, by which the State was to be deprived of a fair price for its land. In the case before us, the consideration of the defendant's promise was, that the creditors or some of the

next of kin of George W. Ingram, deceased, were to be deprived of the fair value of his slaves.

The objection may seem to come with a very bad grace from the defendant, because she was *particeps criminis*. It is not for her sake that it is allowed; but it is founded in general principles of policy, of which she has the advantage, contrary to the real justice as between her and the plaintiff. No Court will lend its aid to a man who founds his cause of action upon a promise, the consideration of which is *contra bonos mores*, or against the public policy, or laws of the State, or in fraud of the State, or of any third person. See the cases referred to in *Blythe* v. *Lovingood*, *ubi supra*.

PER CURIAM. The judgment is affirmed.

JAMES W. WATT *vs.* ALEXANDER JOHNSON *et al.*

An execution which comes to the hands of a sheriff, after the assignment of partnership effects by one of the firm in satisfaction of partnership debts, although tested before such assignment, does not, by relation back to the teste, overreach it; and consequently, the sheriff in such a case, may lawfully return *nulla bona*.

THIS was an action of DEBT, tried before PERSON, Judge, at the Fall Term, 1856, of Chatham Superior Court.

The declaration was against the defendant Johnson and his sureties, on the bond of the former, as sheriff of Cumberland. The breach alleged was, for failing to levy an execution on property liable to the debt.

It appeared that on the 2nd day of January, 1852, an execution, in favor of the plaintiff, against Talliaferro Hunter and Solomon McCullough, was put into the hands of the sheriff, on a judgment that had been rendered against them at the December Term, 1851, of Cumberland County Court, and at the time of the rendition of the said judgment, the defendants, as copartners in working a contract on Cape-Fear river,

owned a number of mules, wagons, carts, and other personal property, within the bailiwick of the said sheriff; upon which execution, the sheriff returned *nulla bona*.

For the defendants, it was shown that, on the 10th day of December, 1851, Hunter, by a deed of bargain and sale, assigned all his interest in the property in question, to one Jas. McCullough; after which, a new copartnership was formed, which was known by the name and style of "McCullough & Co.", consisting of the defendant Solomon McCullough, and his two sons, James and Thomas, and one James McElrath.

On the 1st day of January, 1852, James McCullough, one of the partners in this latter firm, by deed of that date, assigned and conveyed to one John H. Cook, all the said property, and every thing else belonging to the firm of McCullough & Co., in part satisfaction of a debt, which the said firm owed to the said Cook. After which, McCullough & Co. became insolvent, and the remainder of Cook's debt was not collected. The sheriff went, on the day after receiving the execution, to search for property, but could find none other than the mules, wagons, carts, &c., aforesaid, which were then in the possession of Cook, who claimed the same as his property, and forbade the said sheriff, at the risk of a law-suit, to levy on it.

His Honor charged the jury that, if they believed that the sale from Hunter to James McCullough was an honest one, the property in question, after December, 1851, vested in the new company of McCullough & Co., and if they should find that the sale by James McCullough on the 1st of January, 1852, to John H. Cook was *bona fide*, and in satisfaction of a firm debt, they should find for the defendants. Plaintiff excepted.

Verdict and judgment for defendants. Appeal by plaintiff.

Haughton, for plaintiff.
Manly, *Miller* and *Phillips*, for defendants.

Battle, J. The counsel for the defendants have, in their argument here, placed their defense upon two grounds:

First. That the execution which came to Johnson's hands, being upon a judgment against one partner for his individual debt, did not relate back to its *teste* so as to prevent one of the other partners from assigning the partnership effects in satisfaction of partnership debts.

Secondly. That the defendant, as sheriff, was not bound—at least not without an indemnity—to levy the execution upon goods which were not in the possession of the defendant therein, but in that of another person, who claimed them as his own.

The counsel have not been able to refer us to an adjudicated case, or to any elementary writer, directly in point upon their first ground, yet, we believe the doctrine for which they contend, is correct. At common law a *fieri facias* had relation to its teste, and bound the goods and chattels of the defendant as to him, and all persons claiming under him, from that time, 2 Bac. Abr. 733; Bing. on Judgments and Executions 190, 191, 192, (13 Law Lib. 80, 81); *Gilky* v. *Dickerson*, 2 Hawks' Rep. 341. The reason upon which this rule was founded was that, if it were otherwise, the defendant might, as soon as a judgment was obtained against him, sell his property, and thus deprive the plaintiff of the fruits of his recovery. But in England it was found to operate so hardly upon *bona fide* purchasers, that it was changed as to them by the statute 29th Ch. 2, so as to bind the property, only from the delivery of the writ to the sheriff. Bac. Abr. and Bing. on Judgments and Executions, *ubi supra*. That statute has never been in force in this State, and, as we have not enacted a similar one, the rule of the common law still prevails here, as is shown by *Gilky* v. *Dickerson*, *Green* v. *Johnson*, 2 Hawks' Rep. 309, and many other cases.

This rule of the relation of an execution to its *teste*, applies clearly then to the goods of the defendant while he holds in his individual right; but does it apply to such as he may hold in partnership with others? It is very certain that the interest which one has in partnership is, in many respects, materially different from that which he has in his separate pro-

perty. Of the latter, he alone has a right to dispose; but of the goods and chattels belonging to a partnership, each partner has a right to sell them in the course of their business, or to assign them in payment of antecedent debts of the firm, or as security for debts thereafter to be contracted on account of the firm; Collyer on Part., sec. 394, 395, and note 3 to the last-named section in Perkins' edition. Now, in the case of an execution against the separate goods of a defendant, the doctrine of relation may well apply; for, as is said in *Hardy* v. *Jasper*, 3 Dev. Rep. 158, "he is not permitted to defeat *the process*." To this extent it may be sustained upon some show of reason; but that it ought not to be stretched farther, is shown by that very case, in which it was held, that if a *fi. fa.* be issued to one county, and afterwards, an *alias* to another, a sale by the defendant of his property situated in the latter county, made while the first writ was in the hands of the sheriff, was valid. Had the property been in the first county, and the alias issued to the sheriff of that, the goods would have been bound by the *teste* of the first execution. *Brasfield* v. *Whitaker*, 4 Hawks' Rep. 309; *Palmer* v. *Clark*, 2 Dev. Rep. 354. The hardship of this rule evidently operated upon, and influenced, the minds of the Judges in deciding that the case of *Hardy* v. *Jasper* did not come within it. "The party (they say) is restrained by the writ from disposing of any thing, which, by the same writ, can be taken in satisfaction of the debt. This is carrying it far enough; for often, executions, by the fictitious relation to the *teste*, over-reach honest and *bona fide* sales. We find the law upon that subject certain and settled, and, therefore, we cannot change it from any sense of hardship." But as the law was not found to be so settled, when the first *fi. fa.* and the *alias* issued to different counties, the Court would not extend the doctrine of relation to such a case. If the doctrine were extended to an execution against a partner for his separate debt, the evils resulting from it would be vastly greater. It is now well settled, both in England and in this State, as well as in many of the other States of the Union, that, under such an execution, the sheriff

may seize and sell the partnership effects. Collyer on Part., sec. 822, and note 2 thereto in Perkins' Edition; *Vann* v. *Hussey*, 1 Jones' Rep. 381. Each and every partner has also the undoubted right to sell or transfer, in the course of business, or in the payment of debts, each and every article belonging to the firm. Each and every purchaser of those articles might be affected by this inexorable rule of relation, if it were allowed to prevail in such a case. But it cannot be. The right of one partner to sell, and the right of the sheriff to seize the goods by relation under an execution against another, are inconsistent, and one of them must give way to the other. The right of disposition in the partner is, in our opinion, the prior and paramount right, and that of the sheriff to seize the goods, must yield to it and be restricted to such goods as are in the possession of the firm when the officer goes to levy his execution. There is a marked difference between the interest acquired by a purchaser from a copartner, and from the sheriff. The former gets an absolute right in severalty, while the latter becomes a tenant in common of the article with the other partner, and takes subject to an account between the partners and to the equitable claims of the partnership creditors. See note 2 to 822 section of Perkins' Collyer on Partnership. *Treadwell* v. *Rascoe*, 3 Dev. Rep. 50. This difference in favor of the interest of the purchaser from the partner, may, in some degree, tend to show the superiority of his right of disposition, and that it cannot be superseded by the relation of an execution to its teste.

But, perhaps, it may be said that, as the debtor partner has the same power of disposition over all the partnership effects as the others, therefore, all such effects are bound by the relation of the execution to its *teste*, whether sold by him or by the other partners. To this, the reply is, that there is a distinction in this respect, between the debtor's separate and partnership property, in one case, at least, which is well settled upon undoubted authority: If a debtor die after a judgment is rendered against him, an execution may be issued against his goods after his death, which will bind them in the

hands of his executor or administrator, and the sheriff may levy upon andsell them. 2 Bac. Abr. ; Bing. on judgments and executions, *ubi supra.* The reason of this is, that the executor or administrator *represents* the debtor, and can no more "defeat the *process*" than the debtor himself, had he lived, could have done it; but the partnership goods do not devolve upon the executor or administrator of the debtor partner; as to such goods the debtor is not represented by him; the goods vest in the surviving partners, who have the power to sell them for the purpose of paying the debts of the firm and closing the partnership business. The surviving partners claim the goods, not as the representatives of the deceased, but by a right which is incidental to the compact of copartnership. That right cannot be defeated by what Judge Ruffin, in *Hardy* v. *Jasper*, calls a fictitious relation of an execution to its teste.

Another instance may be adverted to, to show that an execution is not always efficacious by relation to its *teste.* When several executions, issuing from different competent tribunals, are in the hands of different officers, there, to prevent conflicts, if the officer holding the junior execution seizes property by virtue of it, the property so seized is not subject to the execution in the hands of the other officer, although first tested. *Jones* v. *Judkins*, 4 Dev. and Bat. Rep. 454. Lord Ellenborough, in *Payne* v. *Drewe*, 4 East 523, held that where there are several authorities equally competent to bind the goods of a party, when executed by a proper officer, that they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which, an execution shall be first executed by a levy.

Our conclusion then, is, that the execution which came to the hands of the sheriff in the present case, after an assignment of the partnership effects by one of the partners in satisfaction of partnership debts, did not, by relation to its *teste*, over-reach such assignment, and, consequently, the sheriff was justified in his return of *nulla bona.* This makes it un-

necessary to notice particularly the second ground of defense, though, we may say, it seems to be well sustained, both by reason and authority.

PER CURIAM. Judgment affirmed.

SIMON M. SMITHWICK *vs.* ABRAM SHEPHERD.

A promise (not in writing) by an administrator, that he would see a debt of his testator paid, or would pay it, is void under the statute of frauds.

THIS was an action of ASSUMPSIT, tried before SAUNDERS, J., at the Fall Term, 1856, of Martin Superior Court.

Albert G. Shepherd owned, and carried on, a steam saw-mill, near Williamston, and under a contract with the plaintiff, boarded himself and his mill-workmen, among whom was his son, William Shepherd, at plaintiff's house. The defendant was the administrator of A. G. Shepherd, who had recently died. In a conversation between the plaintiff, the defendant, and one Hartsook, (who was said to be a trustee of A. G. Shepherd,) concerning the estate, the plaintiff spoke of his account and produced it. Hartsook said the defendant was the administrator and he was the man to pay it; when defendant replied that he would see it paid, or it should be paid. Shortly afterwards he did pay thirty dollars, and the warrant then was issued for the balance, and brought up by appeal.

The plaintiff insisted,

1st. That the promise of the defendant was substituted for the original debt.

2nd. That the defendant's having property applicable to the debt, and having promised to pay, or see it paid, was an assumpsit which discharged the original debtor, and on which plaintiff might rely. This, with the application of a credit thereto, was a consideration to support the promise.

A verdict was rendered for the plaintiff, subject to the opin-

ion of the Court, with an agreement that, if the Court should be of opinion that the action could not be sustained, a nonsuit should be entered.

The Court, being of opinion with the defendant, ordered a nonsuit, from which the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
Donnell, for defendant.

Battle, J. The declaration made by the defendant, that he would see the debt of his intestate paid, or that it should be paid, was, if a promise to pay at all, a special promise within the statute of frauds. Revised Stat., ch. 50, sec. 10, (Rev. Code, ch. 50, sec. 15). It was a promise either "to answer the debt of another person," or, by an administrator, "to answer damages out of his own estate," and, therefore, no action could be brought upon it; because it was not in writing and signed as the statute requires.

If the propositions contended for by the plaintiff were sustainable in this case, they would defeat the effect of the statute in every case, by making the promise operate as a substitute of itself, for the original debt. Such a doctrine cannot, for a moment, be upheld.

The judgment of nonsuit was right, and must be affirmed.

Per Curiam. The judgment is affirmed.

SANDY McKINLEY *vs.* ALEXANDER C. SCOTT.

A bequest of a slave for the life of the legatee, without any limitation over, passes only a life-estate to such legatee. The assent of the executor extends no further than to the life-interest, and the reversion is in the executor, which he may recover after the falling in of that interest.

Action of detinue, tried before his Honor, Judge Ellis, at the Spring Term, 1856, of Cabarrus Superior Court.

The action was brought to recover a slave, named Lizzie, and her child.

Robert Cochran, who was the owner of Lizzie, made a will, and died in 1855. He bequeathed the slave in question to his grand-daughter, Martha Ann, *during her natural life*, and made no further disposition of the slave or her increase. Martha Ann, with the assent of the executor, took possession of the slave, Lizzie, and having intermarried with the defendant, A. C. Scott, the slave went into his possession, and has so remained ever since, having, in the mean time, borne the child, John. Mrs. Scott died in 1854, and the plaintiff, who is the executor of the executor of Robert Cochran, demanded the property, and on defendant's refusal to surrender it, this suit was brought.

These facts being submitted to his Honor in a case agreed, he gave judgment for the plaintiff, whereupon the defendant appealed.

Wilson, for plaintiff.
Osborne, for defendant.

Battle, J. There are three decisons of our Courts directly in point in favor of the plaintiff's recovery, to wit, an *Anonymous case* in 2 Hay. Rep. 161, *James* v. *Masters*, 3 Murph. Rep. 110, and *Black* v. *Ray*, 1 Dev. and Bat. Rep. 334. These cases establish, beyond question, that the bequest of a slave for life, without limiting the remainder over, passes only a life-estate to the legatee; that the assent of the executor extends no further than to such life-interest; and that the reversion remains in the executor, which he may assert after the death of the life owner. The present plaintiff is the executor of the first executor, and consequently represents the first testator, and may maintain the action. If the defendant has any claim for one-third part of the slave in question, and her issue, he must assert it at the proper time, as the administrator of his wife.

Per Curiam. Judgment affirmed.

JOHN M. MARSHALL *and others, propounders, vs.* JAMES M FLINN *and others, caveators.*

Where special instructions are prayed for in the trial of a cause, it is the duty of the Court to respond, either by adopting the prayer, or by refusing to do so. But he is not required to charge in the language in which the application is made; if he substantially conveys the idea to the jury, it is sufficient.

The influence which destroys the validity of a will, is a fraudulent influence, controlling the mind of the testator, so as to induce him to make a will which he would not otherwise have made.

Where the Court erred in ruling out testimony, and a proposition is made by the counsel on the other side to waive the objection, and admit the evidence, which is declined, the error is cured by this waiver and refusal.

ISSUE of DEVISAVIT VEL NON, tried before his Honor, Judge DICK, at the Fall Term, 1856, of New-Hanover Superior Court.

The propounders offered a script purporting to be the last will and testament of William Marshall, deceased, dated 5th of October, 1852. The subscribing witnesses were sworn and examined, and proved that it was executed on the day it was dated, and the paper-writing, read to the jury, is the same.

The caveators resisted the probate of the script, on the ground of mental incapacity in the decedent, and they examined one *Charles Henry*, who stated that he saw and conversed with the deceased twice in the year 1852; and from these two conversations, and an acquaintance of thirty years, he had formed an opinion that William Marshall had not been capable of making a will since 1850.

It was proved that William Marshall, jr., a son of the decedent, died about the 20th of September. 1852. Several witnesses, offered by the caveators, testified that they saw the supposed testator on the day of this son's burial, and about that time, and they were of opinion that he was not in his right mind and was incapable of making a will.

The caveators also offered a witness, who stated that he saw the decedent in December, 1852, and in his opinion, he had not capacity to make a will. They also introduced wit-

nesses, who saw him in 1853 and 1854, who gave the same opinion.

The propounders introduced the *Rev. Mr. Turrentine*, who stated that he was called on to read the burial service upon the interment of William Marshall, jr.; that after the services were over, he had a conversation with the supposed testator, in which he stated that the death of his son William made it necessary for him to alter his will, and asked him to write one for him. The witness replied, that he had not much experience in writing wills, but that a Mr. Green, to whose house he was going that evening, was better acquainted with such business, and suggested his being employed to write it, to which the decedent assented, and it was agreed that witness should bring Mr. Green with him next day. They both came on the next day as agreed, and the decedent dictated to Green the various provisions of his will, of which the latter took a memorandum. He returned home and wrote out the will. On the next day, witness and Green again visited the decedent, and the writing was produced and slowly read to him, which he fully approved. It was then executed by the decedent, and witnessed by him (Turrentine). This witness stated, that on the three days previous to this transaction, he (decedent) was calm and rational, and, in his opinion, fully capable of making a will.

Mr. Green was examined and fully concurred with Mr. Turrentine in his opinion as to the sanity of the supposed testator.

It had been agreed that he (Green) should act as executor, and, therefore, it was arranged that this script should be copied by a neighbor, Mr. Parker. Green and Parker went to the house of the decedent, some ten or twelve days after it was first written, and Parker copied it, and it was executed in the presence of Parker and one Leonard, who became the subscribing witnesses. These two latter were examined on the trial, and sustained Green and Turrentine as to decedent's capacity.

In the course of the argument, the counsel for the caveators, asked the Court to instruct the jury as follows: "That

though the jury cannot weigh the amount of the testator's intellect, still he must have the possession of what intellect there may be, free from any delusion or mental aberration, frenzy, insanity or dementia."

The Court refused to give the instructions in the language in which they were prayed for, but charged as follows: "Weakness of mind was not of itself a valid objection, as the law did not undertake to measure the size of a man's intellect; it did not require that he should be a wise man, but if he was between the wise and the foolish sort, although he inclined rather to the foolish, he was in law capable of making a last will and testament. To enable a man to make a disposition of his property, he must do it with understanding and reason, and if the jury should be satisfied that, at the time of executing the supposed will, William Marshall had not understanding and reason, they should find against the will; but if he knew what he was doing, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of the law were complied with, they should find in favor of the will." Caveators excepted.

The caveators' counsel then requested the Court to charge the jury as follows: "The opinion of a witness, and the weight it ought to have, will depend upon the solidity of the reasons assigned for the opinion and intelligence of the witness."

The Court refused to give the instruction as prayed for, but told the jury, "That the opinions of the several witnesses, the solidity of the reasons assigned for their opinions, (when they assigned any,) and their intelligence and integrity were matters for their consideration." Caveators excepted.

The counsel for the caveators further requested the Court to instruct the jury as follows: "In cases where the mental capacity is called in question, very little weight should be attached to the testimony of casual visitors."

The Court refused to instruct as asked. Caveators again excepted.

The counsel for the propounders, requested the Court to instruct the jury as follows: "A son has a right to use the

influence of persuasion and natural affection to induce a father to make a will. The only sort of influence which the law condemns, and which destroys the validity of the will, is a fraudulent influence, controlling the mind of the testator, so as to induce him to make a will which he would not otherwise have done."

The caveators' counsel objected to the Court giving the instruction prayed, because, as they said, "they had not put the case upon the ground of undue influence, but altogether upon the ground of the want of capacity in the decedent."

The Court asked the counsel, if they withdrew that part of their argument, in which the Court understood them to argue, that the paper-writing, before the Court, was dictated by J. M. Marshall.

The counsel answered, they did not withdraw the argument they had made, because they considered it proper in answer to the evidence offered by the propounders, to show that the decedent had dictated his will, and had assigned reasons for so doing. And they still contended that such dictations and reasons may have been the suggestions of J. M. Marshall, one of the principal legatees, who resided in the same house with the decedent, and assisted him to the door of the room in which the paper was executed.

The Court then gave the instruction asked for by the propounders. Caveators excepted.

One Arthur Bordeaux had been examined as to the character of *Mrs. Balentine*, a female witness of the caveators, and pronounced it bad, both as to truth and chastity.

The counsel for the caveators asked this witness, who they had ever heard say *Mrs. Balentine's* character was bad as to truth and chastity. The counsel on the other side objected to this question, and the Court sustained the objection.

The counsel for the propounders then waived the objection, and agreed that the question might be asked. The counsel for the caveators declined asking the question again, but excepted.

Verdict for the propounders. Judgment and appeal.

W. A. Wright and *Bryan*, for the propounders.
Strange and *London*, for the caveators.

Nash, C. J. We see nothing in this case to induce the Court to interfere with the judgment below. When special instructions are asked for on the trial of a cause, it is the duty of the Court to respond to them, either by adopting the prayer or refusing to do so. But in the former case it is not required that the charge should be given in the words of the prayer. It may be given in such language as is most appropriate to place the principle of law contained in the prayer clearly before the jury. He may refuse to charge *as* required, even where the instructions are proper in themselves, if those given are, in substance, the same, and correctly lay down the rule of law. In this case, we think his Honor, in response to each prayer, has laid down the law correctly.

To the first prayer, the case states the Court refused to give the instruction in the *language* prayed for. He then instructed the jury, that weakness of mind was not, *of itself*, a valid objection, as the law did not undertake to measure the size of a man's intellect; that it did not require that he should be a wise man; that if he was between the wise and the foolish sort; although he inclined rather to the foolish, he was, in law, capable of making a last will and testament, &c.; that he must do it with understanding and reason, and if the jury should be satisfied that, at the time of executing the supposed will, William Marshall had not understanding and reason, they should find a verdict against the will; that if the supposed testator knew what he was doing at the time of making the supposed will, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of law were complied with, then they were to find in favor of the will." We are at a loss to perceive any error in this part of the charge; it correctly embodies the rule of law upon the question of the alleged insanity of the testator, and is very nearly in the language of some of the most approved writers on the subject.

The response to the second prayer embodies the substance of it, though the Judge uses a different phraseology to express the principle, and winds up by telling the jury that the intelligence and integrity of each witness were matters for their consideration.

The third prayer was properly refused. His Honor could not have charged the jury as required without violating his duty, as it would have invaded the province of the jury.

The plaintiff then requested the Court to charge the jury, that the only influence which the law condemns, and which destroys the validity of a will, is a fraudulent influence, controlling the mind of the testator, so as to induce him to make a will which he otherwise would not have made.

To this prayer the defendants' counsel objected, upon the ground that he had not put the case upon the ground of undue influence of John M. Marshall over his father, but altogether on the want of mental capacity on the part of the supposed testator.

The Court then asked the counsel of the defendants if they withdrew that part of their argument, in which the Court understood them to argue that the paper writing then before the Court was dictated by John M. Marshall.

The counsel said they did not withdraw the argument they had made, because they considered it proper, in answer to the evidence offered by the plaintiff, to show that William Marshall, Sen'r., had dictated his will, and had assigned reasons to the defendants for making it as it was, and they still contended that such dictations and reasons *may* have been the suggestions of John M. Marshall, one of the principal legatees, who resided in the same house with the same testator, and assisted him to the door of the room in which he executed the paper writing now offered as his will.

His Honor then instructed the jury as requested by the plaintiffs' counsel.

The reasons assigned for excepting to the plaintiffs' prayer are contradictory. They first object because they had not put the case upon the ground of undue influence, but solely

upon that of incapacity. "But," said the Judge, "I understand you, in your argument, to take the ground that John M. Marshall had dictated the will. If you will withdraw that argument I will not charge the jury as the plaintiffs' counsel request." They admit that the Judge understood them correctly and refuse to withdraw the argument, but insist that it was proper, in answer to the evidence of the plaintiffs, that William Marshall had dictated the will and assigned his reasons; and they still contended that John M. Marshall *may* have dictated the will and assigned the reasons; for, he lived in the house with his father, and had actually helped him to the door of the room where the paper was written. What is dictation, or to dictate? Mr. Bayle says, "to dictate, is to tell another what to write; to indite; to teach; to show another something with authority; to declare with confidence," and that a dictator "is one whose credit or authority enables him to direct the opinion or conduct of another." If John M. Marshall had such power and authority over his father as to be able to direct him how to make his will, and exerted that power to cause him to make a will in which he is the principal legatee, it was, on his part, the use of undue influence, and would destroy the will. But the reason assigned for the suggestion of the dictation of William Marshall is, that he lived in the house with his father, and assisted him to the door of the room where the paper was written. What effect such suggestions might have upon a jury the Court could not tell, it was, therefore, his duty to draw to their attention the difference between legal and illegal influence. In doing so, there is no error.

In the course of the trial, a man by the name of Bordeaux was examined by the plaintiffs as to the general character of a Mrs. Balentine, a witness for the defendants, and he swore that, for truth and chastity, it was bad.

The defendants then asked the witness, who he had heard say her character was bad for truth and chastity. Upon objection being made, the question was ruled out. Mr. Phillips, in his first volume, 292, lays down, that in answer to such ev-

idence, the other party, on cross-examination, may enquire as to their *means* of knowing the general character of the witness assailed, and the grounds of their belief. There was error in the ruling of the Court on this point, (*State* v. *Howard*, 9 New-Hampshire Rep. 475,) and for such error we should have awarded a *venire de novo;* but the plaintiff withdrew his objection and consented that the question should be put. The defendant refused to ask the question again. This waiver, on the part of the defendant, cured the error.

PER CURIAM. Judgment affirmed.

Doe on the demises of B. C. WILLIAMS *et al. vs.* JOHN T. COUNCIL.

A deed made by a clerk and master in Equity after he goes out of office, upon a sale made by him while in office, is color of title, though not otherwise operative.

The proviso for a *new action* within a year after a plaintiff has suffered a nonsuit, as a saving against the statute of limitations, means that there must be the same real parties plaintiff, and the same cause of action in both, but there need not be the same defendant in the new action as in the former; nor does the fact that the new action contains a second count upon the demise of other persons, make any difference.

Although one whose estate is divested and turned into *mere right*, cannot transfer his right, by deed, to a stranger, yet, he may release it to a party in possession.

One who contracts for land, and stipulates that the title shall be made to a trustee for the benefit of his wife when the purchase-money is paid, and who enters and holds as tenant to the vendor, has no legal right that he can convey, or which can be sold under execution, and the only effect his deed, or that of the sheriff, could have, would be to put the purchaser into possession, so as to make him capable of receiving a release.

Where a husband buys land, which is paid for with his money, but directs that the title shall be made to a third person, in trust, for the wife, he has no such trust-estate as can be sold under execution.

Where a trust is divided by giving a particular estate to A, with the remainder or reversion to B, the trust-estate of A cannot be sold by execution under the Act of 1812.

The proviso of a new action, as a saving to an infant, against the statute of

limitations, is a *personal protection*, and the grantee or releasee of an infant, has no right to set up the same.

The principle of remitter applies where one having a wrongful possession, has the title thrown upon him by act of law, but not where he acquires the title by his own act.

This was an action of EJECTMENT, tried before SAUNDERS, J., at a Special Term, (June, 1856,) of Moore Superior Court.

The declaration contained two counts, both dated 1st of June, 1853; one on the separate demise of Benjamin C. Williams, and the other on the joint demise of John D. Williams and others. The land in question, it was admitted on both sides, had belonged to Benjamin W. Williams by a valid title. The plaintiff offered in evidence the last will and testament of B. W. Williams, properly authenticated, devising the land in controversy to the sole lessor, who was his only child and heir-at-law. The plaintiff also offered in evidence a deed for the same premises from Benjamin C. Williams to John D. Williams and others, the joint lessors, dated 22nd of February, 1853, and proved the defendant in possession on the day of the demise.

The defendant produced in evidence a deed for the land in dispute from one Bryan Burroughs, late clerk and master in Equity for the County of Moore, to Josiah Tyson, dated 9th of January, 1841.

The defendant introduced *Josiah Tyson*, who deposed that he purchased this land at public sale in 1834, under a decree of the Court of Equity, as the land of Benjamin C. Williams, and went into possession, and remained on the land five or six years, but he did not take a deed until 9th of January, 1841. He took the deed from Burroughs, who, at that time, had ceased to be clerk and master, Samuel C. Bruce being then the incumbent. In 1841 he contracted with Wm. Watson to sell the land for $3500, and the payment was to be made from the proceeds of the estate of Watson's wife in the hands of J. B. Cox, her trustee, and he entered into bond to make title to the said Cox, Mrs. Watson's trustee, when the purchase-money should be paid. Watson, (he stated,) at that

time, entered into the possession of the premises, as the tenant of him, Tyson, and continued to hold possession as such for ten, twelve or thirteen years, and left in March, 1853, never having surrendered the possession to him, or any one for him.

There was evidence, that the purchase-money was paid about 1846, principally by J. B. Cox, the trustee, but partly by one Moses Cox, a brother of Mrs. Watson; that in 1852, Watson called on Tyson to make a deed for the land to J. B. Cox, as trustee, which was done on the 17th of Feb'ry., 1853. The defendant then offered a deed from Cox to himself, dated 17th of February, 1853, and showed that he immediately went into possession.

The plaintiff, to repel the effect of the adverse possession, under the color of title, showed that Benjamin C. Williams arrived at full age, 20th of September, 1842. He then read a record, showing that he had commenced an action on his separate demise against William Watson, on the 20th of June, 1845, which pended till Spring Term, 1853, of Moore Superior Court, when he took a *nonsuit*. The present action was commenced 30th of July, 1853.

The plaintiff also showed a judgment, an execution, a levy and sale of the premises, as the property of William Watson, and a sheriff's deed for the same to J. D. Williams, and the other joint lessors of the plaintiff in the second count, dated 25th of January, 1853. He also offered in evidence, a deed to the same parties from William Watson, for the premises, which bore the same date as the sheriff's deed.

The plaintiff also introduced the transcript of a record of a cause in the Supreme Court, in Equity, which had been begun in the Court of Equity of Moore county, wherein William Watson was plaintiff, and Benjamin C. Williams and Josiah Tyson were defendants, in which there was a decree declaring that Benjamin C. Williams held the legal estate in trust for Tyson, and that Tyson having sold to Watson, and received the purchase-money, Watson was entitled, through Tyson, to have the legal estate conveyed to him by Benjamin C. Williams.

The defendant's counsel in the Court below contended,

1. That as the joint lessors of the plaintiff, by their own showing, claimed under William Watson, the tenant of Josiah Tyson, under whom defendant claims, they are estopped to deny the title of Tyson, and consequently that of the defendant.

2. That the demise in the name of Benjamin C. Williams could not be sustained; because, by the plaintiff's own showing, the said B. C. Williams had parted with his title, if he had any, by the deed executed by him on the 22nd of February, 1853, and, therefore, had no right of entry on the 1st of June, 1853.

3. That although the present action was commenced within one year after the nonsuit was entered in the former suit, yet, as the two actions are not between the same parties, neither as to the lessors of the plaintiff, nor against the same defendant, there is no saving in favor of the plaintiff against the long adverse possession of the defendant and those under whom he claims.

4. That the sheriff's deed passed no title to the land, for that Watson had no such interest as was liable to sale under the Act of Assembly.

His Honor, upon these several points, being of opinion with the defendant, so instructed the jury. Plaintiff excepted.

Verdict and judgment for the defendant, and appeal by the plaintiff.

Moore and *Haughton*, for plaintiff.
Kelly and *Strange*, for defendant.

Pearson, J. Every count in a declaration is a distinct and separate cause of action. In ejectment, the several counts are usually upon different links of the same chain of title. But sometimes the counts involve different titles. This arises from the fact, that although the nominal plaintiff is the same, yet the lessors, or real plaintiffs, may claim under distinct and unconnected titles. When this occurs the case is apt to be

complicated, and care must be taken to prevent confusion by considering the facts necessary to support the counts respectively, separate and apart from those applicable to the other counts.

1st. We will consider the count in which Benjamin C. Williams is the lessor or real plaintiff. It is admitted that the title was once in him. To show that the title has passed out of him, the defendant relies upon the deed executed by Burroughs to Tyson, in 1841, in consequence of certain proceedings in Equity in respect to the sale of the land. It is conceded that this deed was not operative except as color of title; but the defendant relies on it as color of title, and proves an adverse possession under it by Tyson through his tenant, Watson, for more than seven years. This, in the absence of the other proof, would ripen that title and make it a perfect one. The plaintiff then proved that Benjamin C. Williams did not arrive at full age until September, 1842, and commenced an action of ejectment in June, 1845, (less than three years,) he being the sole lessor, which action was prosecuted until Spring Term, 1853, when there was a nonsuit; and this action, in which the declaration has two counts, one on the demise of Benjamin C. Williams, and the other on the demise of John D. Williams and others, was commenced in July, 1853, (less than a year). The question is, does this save the right of entry, or title of Benjamin C. Williams, under the proviso of the Rev. Stat., ch. 65, sec. 1?

The defendant insists that it does not; for, to have that effect, the new action must be upon the *same title* and between the *same parties*. In this count the title is the same, and the real plaintiff, or lessor, is the same, but the defendants are different. The first action was against Watson; this action is against Council. We are of opinion that, by a proper construction of the proviso, the second action must have one count upon the same title, and have the same lessor. This satisfies the words *new action*, which have not precisely the meaning of another action, generally, but mean another action upon the same cause of action by the same real plaintiff;

but we do not think that the defendant in the new action must be the same person as the defendant in the former action; for, if so, the plaintiff might be deprived of the benefit of this saving, without any fault or laches on his part; the defendant in the first action would have nothing to do but give place to another tenant of the same landlord, or he might convey to a third person, or leave the premises vacant and let a third person enter, and thus force the plaintiff to bring the new action against a different defendant; and it would be absurd to suppose that the defendant in the second action might insist upon the possession of the defendant in the former action, as a bar to the plaintiff's right of entry, although the latter, had he continued in possession, could not, by force of the proviso, have availed himself of his own possession. Nor do we think that the circumstance of the declaration in the new action, having a second count on the demise of other persons, makes any difference; for each count is distinct, and stands upon its own merits, and the one can neither be aided nor prejudiced by the other. "The object of the proviso is to preserve the right of any person having it at the time of instituting an action on his title; and it ought not to harm the true owner that the declaration sets forth separate demises of others, provided the declaration in both actions has a count on the demise of the true owner." *Long* v. *Orrell*, 13 Ire. 123. There a construction is put upon the proviso, and it is held to apply to a case where the declaration in the first action had two counts, and that in the second but one. Our case is the reverse of it, but the principle is the same, and the rule works both ways.

Failing upon this ground, the defendant assumed the position, that the deed from Benjamin C. Williams to John D. Williams and others, dated 22nd of February, 1853, passed the title out of him, and, consequently, the action could not be maintained upon the count in his name.

To this the plaintiff replies, that, as Benjamin C. Williams, at the date of his deed, was out of possession, and had but a mere *right*, the deed was inoperative.

To this the defendant rejoins, that although Benjamin C. Williams could not transfer his right to a *stranger*, yet, as John D. Williams and others, the lessors in the second count, were in possession at the time, the deed from Benjamin C. Williams to them took effect as a *release* of his right, and passed it out of him. To show that John D. Williams and others were in possession, the defendant relied on the fact that the interest of Watson, who was in possession under Tyson, had been levied on and sold at execution sale by the sheriff, and bought by John D. Williams and the others, to whom the sheriff executed a deed on the 25th of January, 1853, and also a deed of the same date by Watson to John D. Williams and the others.

It is clear that although one whose estate is divested and turned into a mere right of action, cannot transfer his right to a stranger, for it would encourage litigation, yet he may release his right to the party in possession, for that ends litigation. So the only question is, were John D. Williams and the others in possession so as to be capable of taking a release? We are of opinion that, whatever may be the effect of the deeds of the sheriff and Watson in other respects, (which will be considered in the examination of the second count,) they did have the effect of putting John D. Williams and the others in possession, by, and through, Watson, who was in the actual possession, so as to place them in a condition to accept the release of Benjamin C. Williams, as to whom they were then in an adversary position. Watson being in possession, the sheriff's deed gave them a right to it, and they could have recovered in ejectment against him in spite of Tyson and any one else. So the deed from Watson amounted to an attornment which made his possession *theirs*. This, it is true, was wrongful as to Tyson, and he might have estopped them from setting up a possession acquired by collusion with his tenant, but for the subsequent entry of the defendant claiming under him. Still they had the possession *de facto* as to Benjamin C. Williams and every one else who was not in a condition to *shut their mouths* by an estoppel. The effect of

the release was to pass the right of Benjamin C. Williams to them. So, we concur with his Honor that B. C. Williams was not entitled to recover on the count in his own name.

2nd. Upon the count in which John D. Williams and others are the lessors, or real plaintiffs, the facts are, that, in 1841, Tyson, having taken a deed from Burroughs, contracted with Watson for the land at the price of $3,500. "The payment was to be made from the proceeds of the estate of Watson's wife in the hands of J. B. Cox, her trustee, and he was to make title to Cox for Mrs. Watson when the purchase-money was paid. Watson entered, at that time, into possession of the land as the tenant of Tyson," and continued in possession until March, 1853, and never surrendered the possession to Tyson. The purchase-money was paid in 1846, principally by J. B. Cox, the trustee, and partly by one Moses Cox, a brother of Mrs. Watson. In February, 1853, Tyson executed a deed to J. B. Cox, as trustee for Mrs. Watson, and on the same day Cox executed a deed to the defendant, who entered upon the land, and this action was commenced. The plaintiff also offered in evidence a transcript of a record in the Supreme Court, of a cause in Equity, wherein Watson is plaintiff, and Benjamin C. Williams and Tyson are defendants, in which there was a decree, June Term, 1852, (8 Ire. Eq. 232,) declaring that Benjamin C. Williams held the legal estate in trust for Tyson, and that Tyson having sold to Watson and received the purchase-money, Watson was entitled, through Tyson, to have the legal estate conveyed to him by Benjamin C. Williams. This evidence and the points made by the plaintiff in the Court below, in respect to it, may be put out of the case, for neither the defendant nor Cox, nor Mrs. Watson, are parties; of course they are not concluded, or in anywise affected by a proceeding which was "*res inter alios acta.*"

The lessors rest their case upon three titles:

1st. The deed from Watson to them.

Watson, besides the possession, had, at most, nothing but a trust estate. Supposing his deed passed that, it would avail

the lessors nothing, because the legal title, upon which this trust depended, was left in Tyson, and, in this action, it is necessary for the lessors to establish a legal title in themselves; and the only effect which the deed had upon the legal title, was to put the possession in the lessors, so as to make them capable of taking a release of the right of Benjamin C. Williams, as has been before shown.

2nd. The sheriff's deed.

From the general manner in which the case was put to the jury, the plaintiff has a right to that view of the evidence which is most favorable to him. Accordingly, it is insisted, that although the money paid for the land was his wife's money, yet, *jure mariti*, it became the money of Watson, there being no proof of a separate estate in the wife. So, we have this point:—A husband buys land which is paid for with his money, but he directs the title to be made to a third person in trust for the wife, has the husband such a trust estate as can be sold under execution? It is clear he has no trust at all, for the trust which would be presumed in his favor, from the fact of the purchase-money being his, is rebutted by the express trust which he declares in favor of his wife.

It is then said, as the husband was in debt, this declaration of trust for his wife is fraudulent and void against creditors. Admit the fraud, it is evident that the statute of 13th Eliz. has no application, and the only mode in which creditors can reach the fund is in Equity.

It is said in the third place, if the wife have the trust estate, it not being secured to her separate use, the husband is tenant by the curtesy initiate, if there be issue, and at all events he is entitled to an estate during coverture; and as this estate was acquired before the act of 1848, the purchase-money having been paid in 1846, whereby Tyson became seized in trust for the wife, this interest of the husband was liable to execution sale under the act of 1812. So, we have this point: If a trust estate be divided by giving A a particular estate, with a remainder or reversion in B, does the case come within the op-

eration of the act of 1812, so that the trust of A may be sold under execution?

It is settled by many cases, that the act of 1812 only applies to a pure, unmixed trust, so that the purchaser of the trust can acquire the *entire legal estate*, without prejudice to the rights of third persons; for, the act does not provide that the purchaser of the trust shall have the legal estate "in the same manner, plight and condition" that he has the trust, as is provided in the 27th Henry 8th, in regard to uses, whereby a part of the legal estate may be taken "to feed" one use, leaving a part of the legal estate, or *scintilla juris*, in the trustee, to supply other uses; but it enacts in broad terms that "the goods and chattels, lands, &c., by force of the execution, shall be held and enjoyed, *freed and discharged from all incumbrances* of the person so seized or possessed in trust for the person against whom such execution shall be sued." In the construction of this statute, the principle adopted is, that it does not apply to any trust except such as entitle the *cestui que trust* to call for the entire legal estate, free from any incumbrance or charge whatever on the part of the trustee, by reason of his duty to others. Our question falls within the principle; indeed, it is the very instance put by RUFFIN, C. J., for the sake of illustrating it in *Battle* v. *Petway*, 5 Ire. 576, which is one of the many cases where the principle is discussed and established. This principle confines the operation of the statute to very narrow limits, leaving creditors, in most cases, to seek relief in Equity, where the several trusts can be ascertained and properly protected.

3rd. The deed of Benjamin C. Williams.

We have seen that the effect of this deed was to operate as a release, passing the right of Benjamin C. Williams to the real plaintiffs in the count, and that the right was "tolled" by the adverse possession of Tyson, unless it came within the saving of the proviso in favor of infants. The question is, can the plaintiffs avail themselves of the proviso so as to protect the right of entry which has passed to them? The saving is a *personal* protection; this is evident from the words used,

and from the object which the law-makers had in view. The intention was to protect those persons whose estates had been divested, and their right of entry tolled, by an adverse possession during their minority, provided they brought suit within three years after coming of age; and in case of a miscarriage in the first action, provided "the party plaintiff, his heirs or executors, as the case shall require, commence a *new* action within one year." We have seen above that, to make it a new action, the real plaintiff must be the same, and the cause of action the same. The count, in the name of these plaintiffs, does not come up to the idea of a *new* action in any one particular; they were not parties to the first action; the cause of action is not the same, (for the demise in the first action might be laid at any time after the death of the father of Benjamin C. Williams, to wit, in 1828, whereas the demise in this count is laid on the 1*st of June*, 1853, and could not have been laid further back than the date of the deed of Benjamin C. Williams); and the defendant is not the same. The principle of *remitter* has no application. That applies where one, having a wrongful possession, has the title thrown on him by act of law—as by a descent; he is then remitted to his "more ancient and better title," but not where he acquires the title by his own act. Coke Lit. Here the lessors of the plaintiff acquired both the possession and the "more ancient title" by their own acts. It follows that they cannot sustain it in this count, on the title derived from Benjamin C. Williams. There is no error.

Per Curiam. The judgment is affirmed.

STATE *vs.* GEORGE INGOLD.

Though a person may enter into a fight willingly, yet, if in its progress, *he be sorely pressed*, that is, *put to the wall*, so that he must be killed or suffer

great bodily harm, unless he kill his adversary, and under such circumstances he does kill, it is but *excusable homicide.*

Where a Judge, in charging the jury in a case of homicide, presents two views of the evidence, in one of which his instruction is erroneous, though the other was right, if it be left uncertain whether or not the verdict of the jury was predicated on the erroneous instruction, the defendant is entitled to a *venire de novo.*

THIS was an INDICTMENT for MURDER, tried before PERSON, Judge, at the Fall Term, 1856, of Alamance Superior Court.

The defendant was indicted for feloniously killing one Stanford Steel, and the material testimony was as follows:

William Coble, a witness for the State, testified, that on the 1st day of September, he was passing the house of George Kimbro, in Alamance county, and hearing some loud talking in the house, which was some ten or twelve feet from the gate, he stopped in the road, and heard the deceased say, "Uncle George, I want no fuss." The prisoner came to the door cursing and swearing, and seemed very angry, and came into the piazza, when one Lankford, who was present, handed him a knife. Witness heard a kind of *cluck* in the house and the prisoner went in. Witness walked down the lane to a locust tree, about fifty steps from the gate, and hearing the prisoner making a *fuss*, he looked and saw Lankford holding him while the deceased was coming out of the house into the lane. After getting out, he said to the prisoner, "If you will come out here, I can whip you," or "I will whip you." The deceased then called to the witness to stop, saying he wished to talk with him, and walked down to where witness was at the locust tree. Here, he took a seat on the roots of the tree, and entered into conversation with the witness. The prisoner continued to make a noise, and said, "he would go down there, although there were a whole parcel of them." (Besides witness and deceased, there was a negro boy, present at the tree.) To this, the deceased replied very insultingly. The prisoner then came out of the house with a drawn knife in his hand. He first walked across the lane, and then turning towards the place where he and the deceased were, advanced to within forty yards of the deceased, when he (de-

ceased) bounced up as if he was going to meet him. The witness then walked off beyond the end of the lane, to where he could not see the parties, but after a little, stepped back and saw them. The deceased, at this moment, had his right hand on the prisoner's left shoulder. Both were standing. Soon deceased took his hand off of the prisoner, and it dropped by his side, and he saw his head bent down on his breast, which is the last he saw. They were then about twenty-five feet above the locust tree, on the opposite side of the lane. The knife-blade was five or six inches long. The deceased was a large and powerful man, weighing about one hundred and eighty; violent in temper, and generally considered a bully. The prisoner was a smaller and less powerful man.

George Kimbro testified, that the deceased came to his house on Saturday, and staid until Monday, the first of September. On that day, about ten o'clock in the morning, the prisoner and Lankford came there. The deceased and prisoner met friendly and drank together freely. About three o'clock, he heard the deceased and prisoner talking about *hitting each other in the face*. They became angry, and witness said, "Boys, I won't have a fuss here." The deceased said, "I won't say another word; I'll go to the barn," and he then left. The prisoner then went into the piazza, and in a little while he said, "I'll be cursed," or "I'll be damned, if one of us has'nt got to die before sun-set this evening." Lankford, at that time, was holding the prisoner. He got loose, and witness saw him popping his fists together as he started. He put both hands on the fence and got over into the lane. Witness called to him to come back, telling him he would make himself liable, but he paid no attention to what he was saying, and went towards the deceased, who was standing in the middle of the lane, near the locust tree. The prisoner stopped when he got within a few feet of the deceased, and they had some words, which the witness could not hear. The deceased then stooped down and picked up a stone about the size of a goose-egg, and threw it at the prisoner's head with violence, but missed him. Deceased then

caught the prisoner by the collar, and they began to push each other until the deceased pushed the prisoner into the jam of the fence and against it. The prisoner was with his back to the fence and bent over on the side, as if one foot had slipped. The deceased then struck the prisoner two blows in the face, and then caught him with his hand about the mouth. The prisoner seemed quiet, and immediately the deceased cried out, "that he was cut." Witness went to him and found him standing with a cut on the left side of the belly, and holding his bowels in his hands. The prisoner was standing there attempting to fix the blade of his knife in the handle, one of the jaws having broken. Witness told him to give up the knife, he refused, and witness knocked it out of his hand and took it. The deceased was taken into witness' house, and died next morning about nine o'clock. Both prisoner and deceased were quite drunk.

This witness further said, upon cross-examination, that he saw the prisoner have the knife some time before the fight began, but he did not see it again, until after Steel was cut. He thought he did not have it in his hand when he left the house and crossed the fence. He heard Lankford tell the prisoner he should not fight. The fence-corner was eight or ten feet from where Steel was standing when the prisoner approached him. Witness thought that the prisoner could not have got out of the fence-corner *handy* after Steel had pushed him there. When the prisoner approached, deceased did not give back at all, but witness could not say whether he advanced or not. During the morning, prisoner proposed several times to go his work, but it being a rainy day, he was dissuaded from doing so by Lankford and the deceased. This witness also stated, that the deceased was a powerful man, of violent temper, and what is called a *fighting man.*

The Court charged the jury (amongst other matters not excepted to) as follows: If the prisoner willingly entered into the fight with the deceased, and during the progress of the fight, however sorely he might be pressed, stabbed the deceased as described by the witnesses, his offense, *at least*,

would be manslaughter, (and emphasised *at least*). But that he might be guilty of murder, and would be, if the jury believed that, before entering into the fight he had formed a deliberate purpose to bring about a fight and use his knife; and in execution of that purpose, he did bring about the fight, and stab the deceased and killed him. To this part of the charge defendant's counsel excepted.

The jury remained out till 11 o'clock next day, and then returned into the Court for further instructions, when the above were reiterated in substance.

The jury again retired, and after a short time, returned a verdict, finding the defendant "guilty of murder."

Kittrell,* for the State.
Bailey, *Fowle* and *Hill*, for the defendant.

Pearson, J. There is manifest error in the first proposition of law laid down by his Honor. "If the prisoner willingly entered into the fight, and during its progress, *however sorely he might be pressed*, stabbed the deceased as described by the witnesses, his offense, at least, would be manslaughter."

By *sorely pressed*, we understand being *put to the wall*, or placed in a situation where he must be killed or suffer great bodily harm, or take the life of his adversary. Supposing there was evidence to raise this point, the offense, according to all the authorities, was excusable homicide, which Foster calls *self-defense culpable*, but through the benignity of the law, *excusable*; Foster's C. L. 273–4; 1 East's Cr. L. 279; 4 Blk. Com. 184; 1 Hale 482. Indeed, as the deceased made the first assault with a deadly weapon, i. e., "a stone about the size of a goose egg"—threw with violence at a short distance, and followed it up by pushing the prisoner against the jam of the fence, gave him two blows, and then caught him with

*Mr. Bailey, the Attorney General, having been of counsel below for the defendant, Mr. Kittrell was appointed by the Court to prosecute this case.

his hand about the mouth, having him against the fence, bent over on the side, before the prisoner struck him at all, if the necessity for killing existed, which his Honor assumed, it would seem to have been rather a case of *justifiable* homicide.

There is a further error in this proposition: his Honor charged that the offense was, *at least*, manslaughter, emphasising the words *at least*. This left the jury uninstructed as to whether, in the opinion of his Honor, it was manslaughter or murder, and they had reason to infer that he inclined to the opinion that it was murder, taking the case in its most favorable aspect. It was error to leave the jury in this state of uncertainty. At all events, it prepared the minds of the jury to lean against the prisoner in the next aspect in which the case was presented.

It was said in the argument for the State, that as the jury found the defendant guilty of murder, which it was assumed they did upon the second aspect in which the case was presented, this error was harmless; and it was likened to a finding in a civil action, where the "general issue" and "justification" are pleaded, and the jury find for the defendant, upon the "general issue," which makes an error in the charge upon the plea of justification immaterial, so that it is not a sufficient ground for granting a *venire de novo*. The cases are not precisely analogous. In the latter, there are two independent pleas, and the matters are distinct and can easily be kept separate. Here, there is but one plea, and it was difficult to keep the matters separate. In fact, there is no telling to what extent the jury, in considering the case in the second aspect in which it was presented, were influenced by the error in regard to the first. If the offense was in no aspect excusable homicide, and in the most favorable aspect, *at least*, manslaughter, who can say that the jury did not find the prisoner guilty of murder upon the first aspect? His Honor left the way open, and it may be that the consideration of the case in the second aspect, without satisfying them that it was the true view, had the effect of bringing their minds to the conclusion, that the prisoner was guilty of murder upon the first aspect;

or, at any rate, of getting the matter so mixed up, that they had no distinct idea, or agreement among themselves, whether they found him guilty of murder, because, having entered into the fight willingly, he inflicted so horrible a stab with the knife, or because they were satisfied, from the evidence, that "*before entering into the fight he had formed a deliberate purpose to bring about a fight and use his knife.*"

That this is the most reasonable way of accounting for the verdict which was given after much hesitation, is confirmed by the fact, although we are not at liberty to say there was no evidence, yet, the evidence was certainly very slight that the prisoner had formed a deliberate purpose to bring about a fight and use his knife. It is true, while they were *holding him* in the piazza, he flourished his knife, and swore "one of us has to die before sun-set;" but every one who has witnessed scenes of this kind, knows that such "rearing and charging and popping of fists," are far from evincing a deliberate purpose, particularly when the opponent is a much stouter and more able-bodied man. The barking of a dog shows that he thinks it safer to *bark* than to *bite*.

As to bringing about the fight, the deceased bantered him, and said if he would come out he would whip him; the prisoner said he would go, *although there was a whole parcel of them*, (from this it would seem he had but little stomach for the fight,) to which the deceased replied very insultingly, and made the onset with the stone. It should be borne in mind, that the prisoner and the deceased were before that day friendly; commenced drinking as friends. The prisoner wished to go to his work, but was persuaded by the deceased to continue in the carouse, and it was not until after they talked about hitting each other in the face, that the prisoner used such furious language. Whether they had hit each other in the face, does not appear; but something occurred which made the prisoner very angry. If he was hit in the face, then the oath that "one must die before sun-set," amounts to nothing, because it was the effect of passion. If he had struck a mortal blow, the killing would have been

manslaughter, and surely, words spoken in a passion, induced by legal provocation, ought not to have more effect than a mortal blow. We think the prisoner is entitled to have his case submitted to another jury. *Venire de novo.*

PER CURIAM. Judgment reversed.

ROBERT GARNER *vs.* ELIZABETH QUALLS *et al.*

Where the obligee represented to the obligor in a bond, that a relation of the latter had committed an indictable offence, and procured the bond in question to be executed, by agreeing not to prosecute for such offence, it is void—whether any such offence had been committed or not.

ACTION of DEBT, tried before BAILEY, J., at a Special Term (November, 1856,) of Granville Superior Court.

The action was brought upon a bond to which, among other pleas, was pleaded, "that the bond was given upon an illegal consideration, to prevent a prosecution for forgery."

It was proved that the plaintiff represented to Mrs. Qualls, the principal in the bond, that her son-in-law, one Fowler, had committed three several forgeries, and told her he would prosecute him for these offences unless she gave him her bond for the amount Fowler owed him, and that if she would give him her bond he would not prosecute. She thereupon procured the other defendants to join in the obligation, and delivered it to the plaintiff. There was no other evidence that Fowler had committed the offences imputed to him than the above declaration of the plaintiff.

His Honor instructed the jury, that if, from the evidence submitted to them, they were of opinion that Mrs. Qualls believed that her son-in-law, Fowler, had committed forgery, as represented by the plaintiff, and gave the bond declared on to prevent a prosecution for the same, the bond was null and void, and the plaintiff could not recover, although they might

not be satisfied that any forgery had been committed by Fowler. Plaintiff excepted.

Verdict for defendants. Judgment and appeal.

Bailey and *Winston*, *Sen'r.*, for plaintiff.
R. B. Gilliam, for defendants.

Battle, J. It is now well established, as a broad conservative principle, that no executory contract, the consideration of which is *contra bonos mores*, or against the public policy, or the laws of the State, can be enforced in a Court of justice. *Blythe* v. *Lovingood*, 2 Ire. Rep. 20; *Ingram* v. *Ingram*, ante 188, decided at this term. It is manifest that contracts founded upon agreements to compound felonies or to stifle public prosecutions of any kind, come within the range of this salutary principle. The counsel for the plaintiff admit this, but they contend that it does not apply to the present case, for they insist that no offence was proved to have been committed, and no prosecution commenced, and that, therefore, there was nothing to be compounded or stifled as the consideration for the defendant's contract. They contend further, that such being the case, the defendants cannot avoid their bond at law, even supposing the testimony of their witnesses to be true; because the alleged fraud was in the *consideration* and not in the *factum* of the instrument. See *Gwynn* v. *Hodge*, ante 168.

The counsel for the defendants, in reply, say there was evidence that a forgery had been committed, derived from the plaintiff's own declaration, sufficient to satisfy the mind of the defendant Qualls that such was the fact, and to induce her to procure the other defendant to join her in the execution of the bond in question. Of this opinion was the presiding Judge, and we, after much hesitation, have come to the conclusion that he was right. If a public prosecution were commenced, a bond given to prevent its being carried on would undoubtedly be void, though it might be afterwards proved that it was frivolous, or even malicious. So, if an of-

fence were, in fact, committed, a bond given to suppress any enquiry about it, would be equally void. The law, in these cases, would not interpose its relief with a view to favor the defendant, for he, as *particeps criminis*, is entitled to no favor; but it is necessary that it should so interpose to prevent the criminal justice of the country from being obstructed or perverted. It is difficult, if not impossible, to distinguish the principle of the case before us from those we have just stated. The motive by which, and object for which, the principal defendant executed the bond to the plaintiff, was to prevent him from prosecuting her son-in-law for forgery. His declarations to her had made that, and that only, the consideration for her contract. Was it a legal consideration? That will not be pretended. If the declarations of the plaintiff were false, that would not alter the motive, inducement, or consideration of the contract, with respect to its illegality. It would only give it the additional quality of fraud; and it would be extraordinary, indeed, if the two combined should have less effect in nullifying the contract at law than would be conceded to the first, if it stood alone. Another singular result would follow from such a doctrine. If the consideration of the bond were *illegal* alone, because immoral, the defendant would have a defence at law. If it were *fraudulent* alone, she could obtain relief in Equity; but if both *illegal and fraudulent*, she would be without redress in any court. We cannot adopt a course of argument which leads to such a conclusion. The language of Lord MANSFIELD, in *Holman* v. *Johnson*, 1 Cow. Rep. 343, is so apposite to our case that we will close this opinion with an extract from it: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounded, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded upon general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this—*ex dolo malo non oritur actio.* No court will lend its aid to

a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the action appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then, the Court says, he has no right to be assisted. It is upon this ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

PER CURIAM. Judgment affirmed.

Doe on dem. of DAVID KERNS *vs.* SAMUEL PEELER.

A deed executed by the husband, for land belonging to the wife, his own name only being inserted in the several parts of the body of the deed, which is subsequently signed and sealed by the wife, and her privy examination taken, does not pass the estate of the wife.

THIS was an action of EJECTMENT, tried before ELLIS, J., at the Spring Term, 1856, of Rowan Superior Court.

The lessor of the plaintiff claimed title, as the heir-at-law of Polly Kerns, wife of Peter Kerns. It was proved that both Peter Kerns and his wife were dead before the bringing of this action, and that the lessor, David, is their only child, and the heir-at-law of the said Polly. The lessor of the plaintiff proceeded then to establish title in his mother and ancestor, the said Polly. To this end he read in evidence a deed to one Moore, the father of the said Polly Kerns, who died in the life-time, and during the coverture, of the said Peter and Polly, whereby the land descended to her, who was his heir-at-law. He then proposed to show that Peter Kerns claimed and possessed the land in question in right of his wife, and that the defendant, and those from whom he derived title, claimed under the said Polly, as well as Peter Kerns, and were, therefore, estopped to deny her title, and he read in evidence a deed from the said Peter to one Swink, and from the

said Swink to one Anthony M. Peeler, and a deed from said Anthony M. to the defendant. The deed from P. Kerns to Swink was also signed by Polly Kerns, to which there was attached a probate and privy examination of her as a feme covert. He then introduced two witnesses, William Walton and Daniel Kerns, who testified, that the deed from Peter Kerns to Swink was originally signed, sealed and delivered, by him (Peter) alone, under which Swink took possession; that some time thereafter, Swink, being informed that his grantor, Peter Kerns, derived title to it through his wife, became dissatisfied, and told said Peter, in the presence of his wife, if she would sign the deed also, he would be content; whereupon, the parties all being present, it was thus signed by her.

The defendant insisted that the deed subsequently signed by Polly Kerns, duly proved and authenticated, was sufficient to pass the title to Swink, under whom he claimed. The plaintiff, in reply, objected to the sufficiency of the deed for that purpose, because, that the probate, as to the husband, had been made several years after the privy examination; he also insisted that the privy examination was not valid.

The Court, being of opinion with the plaintiff upon these several questions, instructed the jury that the plaintiff was entitled to recover. To which defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Boyden, for plaintiff.
Fleming and *H. C. Jones*, for defendant.

Nash, C. J. Two questions are presented by the record. The one relative to the privy examination of the feme covert, it is not necessary for us to consider. Another, which lies at the threshold of the defense, must be first disposed of. The land belonged in fee to Polly Kerns, who was the wife of Peter Kerns. Both of these persons died before the institution of this suit, and the lessor of the plaintiff is the heir-at-law of Polly Kerns. To meet this claim, the defendant al-

leges that Peter Kerns and his wife, Polly, for valuable consideration, sold and conveyed the land in question to one Swink, under whom he claims. If the deed produced by the defendant does convey the right of Mrs. Kerns, then the title is out of the lessor, and the action cannot be supported. That deed constitutes a part of the case, and operates only to convey to Swink the right, title and interest, which Peter Kerns had in the land, and which was for his life only. It conveys away no interest belonging to Mrs. Kerns; it does not purport, even, to do so. She is nowhere mentioned in the deed, but it evidences simply a contract between Peter Kerns and Swink. It is true, it attempts to convey the fee simple, but it only conveys his interest. So far from its being the intention of the parties to embrace Mrs. Kerns' interest in the land when executed, at that time neither Kerns nor Swink appear to have known that she had any interest; at least Swink did not. The case states that, sometime after the execution of the deed, Swink learned that Kerns claimed the land through his wife, and being dissatisfied, upon his proposition, Mrs. Kerns, with the approbation of her husband, signed her name to the deed. This sufficiently shows that the contract of bargain and sale was solely between Kerns and Swink, without any view to the interest of Mrs. Kerns. This brings us to the main question in the case: Did her signing and sealing the deed, under these circumstances, make her a party to it in law? We are of opinion that it did not. The conveyance from Kerns to Swink is dated 1st December, 1823, and, sometime afterwards, Polly Kerns signed and sealed the deed. The deed to Swink was then executed, and he had taken possession before Polly Kerns attempted to execute it. For all the purposes of a conveyance, she might as well have signed and sealed a blank piece of paper. Our attention was called to the case of *Vanhook* v. *Barnett*, 4 Dev. 268, and to *Smith* v. *Croker*, 5 Mass. Rep. 539. Neither of those cases control this. The action in the first was upon an administration bond, in which there was a blank left for the insertion of the names of the obligors. The name of Barnett was not inserted in the body of the bond, but he executed it with the other sureties.

We take it, that the obligors had all signed and sealed the bond before their names were inserted in the body of it, and the only question on this point was, that in order to bind Barnett, it was sufficient that he should have executed it. So, in the case in Mass. Rep., which was an action against a surety upon a bond, the surety signed the instrument before his name was inserted. The Court held it to be immaterial. These decisions were correct, but they do not fit our case. There are cases showing that it is not, in all instances, necessary for parties' names to appear in the body of an obligation: If he executes it by signing and sealing, as in the case of an obligation to pay money absolutely or conditionally. If the obligation begins "we promise to pay," &c., all the parties who execute it are bound; or where, in such an instrument, a blank is left for the names of the obligors. But all these cases fall short, for the reason assigned herein-before to govern this. The conveyance by Peter Kerns takes not the slightest notice of any interest in the land, possessed by the wife, Polly. The deed was full and complete when Peter Kerns executed and delivered it, and the wife was no party to it. Nor did Swink bargain for her right, but for the husband's. The only way whereby, in our law, a feme covert can convey her real estate, is by joining her husband in the conveyance. It takes the place of the common law assurance by fine. Justice Blackstone, in the 2nd vol. of his commentaries, page 355, says, "the fine is the usual, and almost the only safe, method whereby she can join in the *sale*, settlement, or incumbrance of any estate." In order to assure the estate of the feme covert to the cognizee, she must be a party to the whole proceedings, and be privily examined. This mode of conveyance never was in force in this State. The conveyance by deed of bargain and sale, accompanied by the privy examination of the wife, being more expeditious and less expensive. In analogy to the conveyance by fine, she must be a party with her husband in the *conveyance* at the time it is executed. It is not sufficient that, at any subsequent period, she signs and seals the deed so previously made. At the time she attempted to

execute the deed, her husband had no estate in it, she, therefore, could not join him in the sale at that time. The legal title to the premises is not in the defendant, but in the lessor of the plaintiff.

PER CURIAM. Judgment affirmed.

NATHAN GREEN *vs.* A. G. THORNTON.

A guaranty, at the time of a contract between two or more persons, is binding upon the guarantor, because it is founded upon the consideration existing between the principal parties; but if it be made afterwards, without any new consideration, it is not obligatory, and putting it in writing (if not under seal) will not help it.

But such new consideration need not be expressed in the writing; it may be proved by parol *aliunde*.

THIS was an action of ASSUMPSIT, tried before SAUNDERS, J., at the Fall Term, 1856, of Johnston Superior Court; brought up by appeal from a justice of the peace.

The plaintiff declared on the following instrument of writing, viz:

"Articles of agreement made and entered into this 2nd of March, A. D., 1852, between William Broadwell, of the county of Johnston, and State of North Carolina, on the one part, and Nathan Green, on the other part, of the county and State aforesaid, viz: The said William Broadwell doth agree to give the said Nathan Green one hundred and three dollars for twelve months' work, commencing the 12th day of December, 1851. The said Nathan Green doth agree to work twelve months with, and for, the said William Broadwell for the aforesaid one hundred and three dollars.

WILLIAM BROADWELL, [*Seal.*]
A. G. THORNTON, Security.
NATHAN GREEN."

The execution of the instrument was proved, and it was

also proved that Green, the plaintiff, had worked twelve months according to the contract. There was a credit endorsed of $30, and this suit was brought for the balance.

The defendant contended that the instrument sued on was not sufficient to authorise a recovery against the defendant; but his Honor was of a different opinion, and so instructed the jury, who returned a verdict for the plaintiff.

Defendant excepted to the instruction and appealed.

Moore, for plaintiff.
Miller and *Winston*, *Sen'r.*, for defendant.

Battle, J. The instrument executed by Broadwell and the plaintiff, is in the nature of an indenture, and would be an indenture had it been sealed, as well as signed, by the plaintiff. Being in the nature of an indenture, no persons are properly parties to it except those between whom it purports to be made, and, in this respect, it differs from the case of *Vanhook* v. *Barnett*, 4 Dev. Rep. 268, to which the plaintiff's counsel refers. See *Kerns* v. *Peeler*, (ante, 226,) decided at the present term. The contract made by the defendant, Thornton, not being under his seal, is a simple contract, no matter for whom, or for what, he intended to become "security." The plaintiff's counsel insists that the defendant is surety either for Broadwell alone, or for both the parties, and that in either case, he is entitled to recover. The counsel for the defendant contends that the agreement is void for uncertainty; but if not, then it is, in effect, a guaranty for the faithful performance by Broadwell of his agreement to pay the plaintiff for his labor, and that, as such, it is void for the want of a consideration. He contends that the articles show that the agreement was, in fact, made on the 12th of December, 1851, when the plaintiff commenced work, though not reduced to writing until the 2nd of March following, and that, though the defendant, at the latter date, agreed to guaranty Broadwell's contract, there was then no consideration, however it might have been had the guarantee been contempora-

neous with the contract between the parties on the 12th of December, 1851.

It is not, and cannot be, denied, that a guaranty in writing, made at the time of a contract between two or more persons, is binding upon the guarantor, because it is founded upon the consideration which exists between the principal parties. But if it be made afterwards, without any new consideration, then it is not obligatory, and putting it in writing, if not under seal, will not help it. *Rann* v. *Hughes*, 7 Term Rep. 350, note a. The statute of frauds does not require the consideration to be in writing, and it may, therefore, be proved by parol; *Miller* v. *Irvine*, 1 Dev. and Bat. Rep. 103. In the present case there was no such proof, as the bill of exceptions shows that the defendant's liability was determined by what appeared on the face of the instrument itself. The question then is, whether the instrument discloses any consideration for the defendant's promise, supposing that promise to be as contended for by the plaintiff. We think it does not. It is evidently the written memorial of a past transaction. The plaintiff had been working for Broadwell somewhat more than two months and a half upon the contract when it was reduced to writing, and we cannot presume, from the instrument, that the suretyship of the defendant was stipulated for in the original contract. If it were, the defendant would be bound, (provided his guaranty is sufficiently certain,) but if not, then he could not be held liable without proof of some new consideration. The burden of proof is upon the plaintiff, which, upon a second trial, he may, perhaps, be able to make, but in the present state of the case he cannot retain his judgment, which must be reversed in order that a *venire de novo* may issue.

Per Curiam. Judgment reversed.

JAMES BATTEN *vs.* JAMES FAULK.

A bond given by a slave, with a freeman as surety, is against the policy of the country, and void as to both.

ACTION of DEBT, tried before SAUNDERS, Judge, at the Fall Term, 1856, of Johnston Superior Court.

The action was originally commenced before a single justice of the peace, and brought to this Court by successive appeals. The plaintiff declared on a sealed note, for seventy-five dollars, made by one Andrew Shaw, a slave, and the defendant as his surety. The execution of the instrument was proved, and the only question was, whether it was void as to the surety, as being against the policy of the State.

A verdict was taken, subject to the opinion of the Court, with an agreement to enter a nonsuit, in case he should be of opinion against the plaintiff.

His Honor, on this question, being of opinion in favor of the plaintiff, gave judgment accordingly, from which the defendant appealed.

Cantwell, for plaintiff.
Miller, *Rogers*, *Winston*, *Sen.* and *Fowle*, for defendant.

NASH, C. J. The action is upon a promissory note, to which there are two names as makers, the defendant and one Andrew Shaw. The latter is a slave, and is the principal in the bond, and the former executed it as his surety. The case presents the question, whether a person can bind himself, as surety, for the performance of a contract which is forbidden by law. Under our system of laws a slave can make no contract. In the nature of things, he cannot. He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract. He has no legal mind. He is the property of his master. All the proceeds of his labor belong to his master. If property is devised or given to him, the devise or bequest is void, and the

gift of personals, either belongs still to the giver, or becomes the property of the owner of the slave. A slave has no legal *status* in our courts, except as a criminal, or as a witness in certain cases. The policy of our laws in keeping slaves within their proper sphere, has run through all our legislation, where their acts are the subject-matter. The 34th chapter of the Revised Code, secs. 83, 84, 85, and 86, forbids all trading with slaves, except upon certain conditions. In this case the defendant became bound, that the slave, Andrew, should pay the plaintiff the sum of $75. Andrew, then, was the principal in the note. He contracted the debt with the plaintiff, and he must, therefore, have traded with him. We are not informed what the consideration was, whether work or labor, merchandise sold, or money lent. If it was either of these, it was illegal. We are not trying an indictment, either against the plaintiff or defendant, under the act referred to. To sanction this transaction, the policy of the State would be manifestly contravened. One keeping a grog-shop, or store, could easily secure the profits of his illegal act by getting a white man to secure to him the ill-gotten fruits of the trade, although he will still run the risk of a prosecution. The 85th section of the Act referred to, declares, "nor shall any person at any other time, buy, or receive from any slave, without a written permission for that purpose, from the person then having the management of such slave, specifying the articles to be sold," &c. If, therefore, a slave carries with him money to pay for the article, he must have a written permission, specifying the amount of money to be laid out; for the payment of the money is trading within the act, and forbidden by it. We are satisfied that this transaction was in violation of the law of the country and its settled policy. It infringes upon the rights of the master; leads directly to the destruction of the value of his property; and encourages that spirit of personal freedom in our slaves which is pregnant with so many fearful results.

This case has been compared to a bond given by an infant, to which an adult is the surety. This is inoperative as to the infant, but binding on the other. Also, a bond given by a

feme covert is void as to her, but good as to the surety. Neither of these instances control our case. The bond of an infant is not void, but only voidable. The incapacity of a feme covert springs from the social connection in which she stands to her husband. But even a feme covert may make a valid contract, binding in Equity, upon such property as she may have independently of her husband. These contracts are not unlawful or contrary to the policy of the State. Contracts made with a foreign enemy, or for smuggling, are more in point. The case of *Ingram* v. *Ingram*, decided at this term, (ante 188,) sustains this opinion.

Believing, as we do, that the whole transaction was illegal and in violation of the settled policy of the country, we are of opinion that the Court erred in giving judgment for the plaintiff.

The judgment, according to the agreement of the parties, is set aside, and a judgment of nonsuit awarded.

PER CURIAM. Judgment reversed.

THOMAS LOWE, EX'R. *vs.* JESSE SOWELL *et al.*

Where a bond has been standing for ten years, and the presumption of payment from the lapse of time is relied on, contradictory and false statements made by the defendant as to the time, place and manner of discharging the bond, are not sufficient to repel the presumption.

ACTION of DEBT, tried before SAUNDERS, Judge, at a Special Term of Moore Superior Court, November, 1856.

This case was before this Court at its December Term, 1855, (reported 3 Jones' Rep. 67). The plaintiff offered evidence as to a credit, in 1841, of twenty dollars endorsed upon the bond sued on, which was dated in 1835, for the purpose of rebutting the presumption of payment, which was in the handwriting of a person now deceased, but there was no evidence of its being with the knowledge and sanction of the defendants.

Joel Sullivan was then examined as a witness. He stated that he was indebted to the defendant Jesse Sowell, and received the bond in suit, which is for $276, from the testator of plaintiff, with authority to arrange and settle it, he being surety on it, and it was agreed by Sowell and the testator, that the bond should be credited with whatever he (Sullivan) owed him (Jesse Sowell,) and he was to account with the testator for that amount; that a calculation was made by one Daniel, now dead, and by A. F. Sowell, a son of the defendant Jesse, and they reported, as due to defendant, $308,93, up to 19th of September, 1845, which was less than the principal and interest of the bond held on him by the testator. Jesse Sowell was dissatisfied with the calculation, and objected to the credits being put on the bond, but afterwards gave up the papers on Sullivan. Witness afterwards saw Jesse Sowell, who was still dissatisfied, and witness offered to give him back the papers if he could point out any error in the calculation; this he declined, but still said there was an error, and that the amount due was enough to pay the debt to Hoover's estate.

The defendant E. Q. Sowell, offered in evidence a bond for $65, dated 10th of August, 1843, given by him, with his brother as surety, payable to plaintiff's testator, and stated that this bond was given for his part of the pork, which was the consideration of the bond for $276,93, and at that time the testator declared that that satisfied his bond. With this understanding, A. F. Sowell became surety to this bond of $65, and there was evidence going to show that this latter bond had been paid off by the defendant E. Q. Sowell.

The plaintiff then offered evidence tending to show that this bond of $65 was given for another and a different bond than the one sued on.

The defendants relied upon the presumption of payment arising from the lapse of time. They also contended, that they had shown an actual payment of the bond sued on.

The Court instructed the jury as follows: "That as the credit of $20 had been entered without the defendants' au-

thority, this credit could not operate as an answer to the presumption of payment; but if the jury should be satisfied that the settlement was made with the knowledge of Jesse Sowell, he then acknowledged that the bond of $276,93, was due. Claiming a greater credit than the $308,93, as reported from the calculation made, and insisting that the whole debt was paid, would be such an acknowledgment as to repel the presumption of payment." Defendants excepted.

The counsel for the defendants asked his Honor to instruct the jury, that this acknowledgment of Jesse Sowell, if such it was, being made after the expiration of ten years, could not operate to answer the presumption so far as the other defendant, E. Q. Sowell, was concerned.

The Court refused so to instruct, but told the jury that, "if the defendant, E. Q. Sowell, insisted that the bond of $65, dated August, 1843, was given as his proportion of the bond of $276,93, it would be such an acknowledgment, on his part, as to repel the presumption of payment, whether the jury should allow the credits for the amount of that bond or not." Defendants excepted.

Verdict and judgment for the plaintiff. Appeal by defendants.

No counsel appeared for the plaintiff in this Court.
Kelly and *Haughton*, for the defendants.

PEARSON, J. We do not concur with his Honor in the view taken of the question presented by this case. If, after a note has been standing over for more than ten years, the obligor says, "I paid the note in full at a particular time and place," and at the trial relies on the presumption of payment raised by the statute, the fact, that he is not able to prove that he did pay the note in full at the particular time and place, or even proof that he did not then and there pay it, is not sufficient to repel the presumption. The inference or implication to be drawn from these facts, would not have been

such an acknowledgment of a debt as would repel the bar of the statute of limitations, even at the time when the courts leaned against that plea, and held almost any admission or promise sufficient to have that effect. It cannot be allowed to have the effect of rebutting the presumption of payment, without introducing all the evils (and perhaps more) which grew out of the old notion in regard to the statute of limitations. It would be better to repeal the statute at once.

So, if the defendant says, "I satisfied the note long ago in a settlement made with a particular individual, and surrendered up notes to the full amount, although there was a mistake, and the credit in full was not entered," the fact, that he is not able to show the mistake, or if the plaintiff proves that, in truth, there was no mistake, and that the notes surrendered did not reach to the full amount of the note and interest then due, but only to the amount of the credit which was entered, is not sufficient to rebut the presumption.

So, if the defendant says, "I satisfied the note by giving another note, with A. B. as surety, which latter note, I have also paid off," proof that the last note was not given in satisfaction of the note sued on, but in satisfaction of another and a different note, is not sufficient to rebut the presumption; such proof only shows that the defendant had not paid at the time and place, or in the manner alleged, but *non constat* that he did not pay at some other time or place or in some other manner, and the law raises a presumption to this effect, to defeat "stale debts." *Venire de novo.*

Per Curiam. Judgment reversed.

JOSEPH S. DEY *vs.* JESSE B. LEE.

Where an order made by a County Court directed to a public agent, commanding him to pay a contractor for work done, is revoked by a subsequent Court, such agent is discharged from a promise to pay such order made before the revocation.

Action of Assumpsit, tried before Bailey, J., at the Fall Term, 1856, of Currituck Superior Court.

The plaintiff declared for the nonpayment of a certain county order in favor of one Gilman, and which, on certain conditions, it was alleged he had promised to pay. It appeared that Gilman had contracted with commissioners appointed by the Court to do certain work in the office of the public register, in transcribing a book, &c., which was represented to the Court as having been done according to the contract; whereupon the Court made an order for his payment. The order in question was as follows:

"Currituck County, November Term, 1854.

Ordered that John Gilman, public register, be allowed the sum of one hundred and fifty dollars for transcribing one book and re-indexing several others.

Attest. J. W. Baxter, C. C. C."

Which was endorsed, "Pay the within to J. S. Dey, for value received. Signed. J. Gilman."

This order was presented to the defendant, who was the county trustee, before it was endorsed. He promised the plaintiff if he would procure the endorsement of the said Gilman, he would pay him the amount. He did so, and again presented it to the defendant, who refused to pay, alleging that Gilman owed him sixteen dollars, and if the plaintiff would not deduct that amount he would hold the money until he could make it out of the same.

After the endorsement, as above stated, was made, and after the defendant's refusal, as above stated, but before the bringing of this suit, the County Court of Currituck passed an order instructing the defendant not to pay the order above recited.

The defendant contended that he was not liable for this debt in his individual capacity; and that, the order being reversed, he was discharged from his promise to pay; and further, that there was no consideration for the promise. He also contended that the promise not being in writing the defendant was protected by the statute of frauds.

The Court intimating an opinion that the plaintiff was not entitled to recover, in submission thereto he took a nonsuit and appealed.

Jordan, for plaintiff.

Smith, for defendant.

Nash, C. J. This case is governed by those of *Dameron* v. *Irwin*, 8 Ire. Rep. 421; *Tucker* v. *The Justices of Iredell*, 13 Ire. R. 434. The first was an action on a bond executed by the defendants, who were commissioners, appointed by the County Court of Cleaveland, to make a contract for the building of a court-house. There was a dispute as to the sufficiency of the work, and the contractor brought the action. The Court decide that the action could not be sustained, because the defendants were public agents, and not bound individually. They had not so contracted. The case of Tucker is directly in point. Under a contract with commissioners, duly appointed, the plaintiff had built a bridge for the county, and the County Court had made an order for payment by the defendant, who was the county trustee. This order was presented, but not paid for want of funds; though the defendant had promised to pay when funds came into his hands. At a subsequent Court that order was repealed. In their argument, the defendant's counsel took the position that the action ought to have been against the trustee. The Court say no action lay against the trustee on his promise to pay when funds came into his hands, because he would hold the money as a public officer, and while in his hands it was subject to the control of the County Court, without whose authority he could not pay it to any one.

In our case, after the second order of the Court reversing the first, under which the promise was made by the defendant, and upon which the action is brought, the defendant had no power to pay the demand of the plaintiff. He was not personally liable, for he was a public officer, and as such the promise was made. There is no error.

Per Curiam. Judgment affirmed.

J. V. & T. SYMONS *vs.* T. H. NORTHERN.

After a defendant has appeared and pleaded in chief to an attachment, it is too late to object to errors in the form of the attachment.

MOTION to dismiss an ATTACHMENT, heard before PERSON, J., at the Fall Term, 1856, of Davidson Superior Court.

The attachment, which issued in this case, is as follows:

"State of North Carolina, } To the sheriff or any other
Davidson County. } lawful officer:

Whereas, James V. and T. Symons & Co. have complained on oath before me, John P. Mabry, one of the justices of the peace for the said county, that T. H. Northern is justly indebted to them to the amount of five hundred dollars, and oath having been also made, that the said T. H. Northern hath removed, or is about to remove himself out of the county, or so absconds or conceals himself, that the ordinary process of law cannot be served on him; and the said J. V. & T. Symons and Co., having given bond and security according to the directions of the Act of the General Assembly in such case made and provided:

"We therefore command you, that you attach the estate of the said T. H. Northern, if to be found in your county, or so much thereof, repleviable on security, as shall be of value sufficient to satisfy the said debt and costs according to the complaint; and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon to be had at the court-house in Lexington, on the second Monday in February, so as to compel the said T. H. Northern to appear and answer to the above complaint, when and where you shall make known how you have executed this attachment. Given under my hand and seal. J. P. MABRY, J. P."

The attachment was issued on the 10th of December, 1855, and returned to February Term, following, of Davidson County Court, levied on various personal chattels belonging

to the defendant. Whereupon an order of publication was made, and the cause continued. At May Term of the Court, the defendant replevied the property, and appeared by his attorneys in the cause, who pleaded "general issue," "payment and set off," "statute of limitations," and the cause was continued. At August Term of the Court, a motion was made to dismiss the attachment, because there was no date to it, and because it was not made returnable at "a Court to be held for the county of Davidson," &c., but only at the court-house. The County Court refused to dismiss, and the defendant appealed to the Superior Court on the interlocutory motion, and his Honor, on consideration of the motion, being of opinion that, by coming in and pleading in chief, he accepted the plaintiffs' declaration, and that it was too late when the motion was made, to take advantage of the defect in the process designated, also refused to dismiss, and ordered a procedendo to the County Court, from which judgment the defendant appealed to the Supreme Court.

Miller and *Gilmer*, for plaintiffs.
Kittrell and *Gorrell*, for defendant.

Battle, J. We agree with his Honor that, after the defendant had appeared and pleaded, it was too late for him to object to the validity of the attachment, on account of the errors specified, which were, that it had no date and was defective in omitting to say "at a Court to be held for the county of Davidson, at the court-house in Lexington, on the 2nd Monday in February *next*."

A defendant may come into Court without process, and confess a judgment, (*Farley* v. *Lea*, 4 Dev. and Bat. Rep. 169,) and we cannot perceive any reason why he may not come in, in the same way, and accept the plaintiffs' declaration and plead to it. If this be so, why may he not appear and plead upon defective process? The main object of the leading process is to bring the defendant into Court, and if he do not choose to object *in limine* to the manner in which

he has been brought in, it would be wrong to allow him to do so after he has, by his acts, admitted himself to be there, ready to defend himself against the plaintiffs' action. The case of *Houston* v. *Porter*, 10 Ire. Rep. 174, referred to by the defendant's counsel, cannot avail him, because there, the defendant in the attachment did not appear, and the objection was taken by the person who was summoned as garnishee. The same may be said of the cases of *Washington* v. *Saunders*, 2 Dev. Rep. 243, and *Clark* v. *Quinn*, 5 Ire. Rep. 175, in which the objections were taken by competing creditors. In *Washington* v. *Saunders*, it is expressly said by the Court that "the appearance of the defendant will cure many defects." In the present case, the defects related, altogether, to the time and place of appearance, by which it is manifest that the defendant was not at all prejudiced, because he did appear at the proper time and place, and acted just as he would have done had the writ of attachment been in all things perfect. Surely, after having done this, he ought not to be allowed to retrace his steps for the purpose of making an objection to a process, which, as to him, is *functus officio*.

The interlocutory order from which the appeal was taken is affirmed, and this must be certified as the law directs.

PER CURIAM. The judgment is affirmed.

SAMUEL ANDERS *et al. vs.* ELIZABETH ANDERS *et al.*

It is not regular upon the hearing of exceptions to the report of a jury, ordered to lay off a public road, for the Court to consider of the propriety of such order.

An appeal from the judgment of a County Court upon exceptions to the report of a jury, ordered to lay off a road between certain *termini*, only embraces such exceptions, and does not take up the merits of the petition.

THIS was a petition to lay out and establish a public road,

tried before PERSON, Judge, at a Special Term, January, 1856, of Bladen Superior Court.

The petitioners filed their petition, *ex parte*, in the Court of Pleas and Quarter Sessions for Bladen county, having previously given twenty days' notice of their intention to do so, to all persons over whose land the road was to pass. Notice of the filing thereof being posted at the court-house door, according to law, until the next Court, it was then ordered that the road should be laid out, &c. A jury was accordingly summoned, who laid out the road and made their report to the next Court, when the defendants came in, and, by leave of the Court, made themselves parties. The report of the jury was confirmed, and from that judgment the defendants prayed an appeal, which was allowed. In the Superior Court, the petitioners moved to dismiss the appeal, because the defendants had no right to appeal from the judgment of the County Court at that time, but should have made themselves parties, and appealed when the laying out of the road was ordered. The Court being of a different opinion, the case was heard upon its merits *de novo*, and judgment was given, upon consideration of the whole matter, that the petition be dismissed with costs. From which judgment the petitioners appealed.

E. G. Haywood, for plaintiffs.

No counsel appeared for the defendants in this Court.

BATTLE, J. The principle established in the cases to which we are referred by the counsel for the plaintiffs, is just and proper, and by it we must be governed in the decision of the present. That principle is, that when, upon a petition to the County Court that a certain thing be done, which it is competent for that Court to order, the Court makes the order that it shall be done, a party dissatisfied may appeal from it; but if he neglect to do so, and afterwards object to the regularity or sufficiency of the proceedings under it, and they are confirmed, his appeal then, will carry up the question upon the proceedings only, and not the original order. This was

clearly stated by the Court, as the general rule, in *Harvey* v. *Smith*, 1 Dev. and Bat. Rep. 186, though for reasons peculiar to that case, which was a petition for the re-probate of the testament of a married woman, it was decided to be an exception. The principle was again recognised in the *State to the use of Dula* v. *Laws*, 7 Ire. Rep. 375, having been previously applied to the case of a petition for dower, in *Stiner* v. *Cawthorne*, 4 Dev. and Bat. Rep. 501.

No decision has, as yet, been made upon the point in the case of a petition to the County Court for laying off a public road; but the reasons, upon which the rule is founded, apply with as much force to such a case as to any other. When the County Court makes the order that a road shall be laid out between the *termini* therein mentioned, according to the prayer of the petition, it is a "judgment, sentence, or decree of the Court," from which any person dissatisfied, may pray an appeal to the Superior Court: 1 Rev. Stat., ch. 4, sec. 2, clause 5; Rev. Code, ch. 4, sec. 2. "It is (say the Court in *Harvey* v. *Smith*) a sentence, materially affecting the subject-matter in contestation; in form, final on the *point* decided; and which the dissatisfied party ought to have an opportunity of reviewing in the appellate tribunal, before it may lead to further mischief. Where the dissatisfied party neglects to appeal from such a sentence, it is not regularly re-examinable in the superior tribunal. All objections thereto which may be waived by not being brought forward in apt time, are waived, and the cause proceeds in the appellate Court, as it ought to have proceeded in the Court below, subsequently to that sentence."

In the present case, the order passed without objection; but after all the trouble and expense attendant upon the summoning of a jury and having the road laid out, the defendants came forward, had themselves made parties defendant to the cause, and then, for the first time, objected to the order, and moved to have it set aside. We hold that they were then too late for any objection, except one to the report of the jury, and that their appeal to the Superior Court did not dis-

turb the order for laying out the road, but only took up their exceptions to such report. See *Stiner* v. *Cawthorne*, 4 Dev. and Bat. Rep. at p. 505.

The judgment of the Superior Court dismissing the petition was therefore erroneous, and must be reversed; and this will be certified to the said Superior Court, to the end, if there is no sufficient exception to the report of the jury, it may be confirmed; and if it be set aside as erroneous or insufficient, a *procedendo* may issue to the County Court, in order that another jury may be summoned to lay out the road according to law.

PER CURIAM. Judgment reversed.

MEMORANDUM.

*** WILLIAM A. JENKINS, Esquire, of Warrenton, was elected Attorney General, from and after the end of the session of the last Legislature.

MR. BATCHELOR, who had been appointed by the Executive, to the office of Attorney General, until the end of the Legislature, resigned the same at an early day of the session; whereupon, WILLIAM H. BAILEY, Esq., of Hillsborough, was elected *ad interim*, and attended to the State causes during this term.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1857.

SOLOMON MIZELL, JR., *v.* JOSEPH H. BURNETT.

Under the statute of frauds a contract, in writing, to sell land, signed by the vendor, is good against him, although the correlative obligation of the buyer to pay the price, is not in writing, and cannot be enforced against him.

Where the owner of timber trees, living in twenty-two miles of the vendee, offered, in writing, to sell said trees, provided the other would comply with certain terms, which were not complied with for twenty days, at the end of which time, performance of the precedent terms was offered and refused by the seller, who also refused to perfect the contract; *Held*, upon the ground, that the delay was unreasonable, that the plaintiff was not entitled to recover upon the written offer or agreement. A right depending upon a condition precedent, does not accrue unless the condition be performed, although the performance becomes impossible by the act of God.

ACTION of ASSUMPSIT, tried before his Honor, Judge ELLIS, at the Spring Term, 1857, of Washington Superior Court.

The defendant was the owner of a tract of land on the Roanoke river, called the Walling tract, on which there were growing a large number of white-oak trees, suitable for making staves. It appeared that the plaintiff and defendant be-

ing in treaty relative to the sale and purchase of these trees, the former, about 1st of February, 1853, went to examine them, and thence went to see the defendant, who lived at Williamston, Martin county. What then took place between the parties did not appear, except as may be gathered from the evidence thereafter arising. On the 14th of February, 1853, the defendant wrote to L. S. Webb, cashier of the Windsor Bank, who lived in the town of Windsor, about seven miles from the residence of the plaintiff, a letter, of which the following is a copy:

"Williamston, Feb'ry 14th, 1853."

"Sir:—I sold Solomon Mizell, Jr., some oak timber, amount $800. I was to take such names to the notes enclosed as you would write me were good for the amount. I also, send a letter over to Solomon Mizell, Jr., please give it to him (to-day) if he is in town."

In the letter to Mr. Webb, was enclosed the following letter of the same superscription and date, directed to the plaintiff:

"Sir:—I received your letter of the 10th inst., and would say in reply, you can have my oak timber on the tract of land, known as the Walling tract, on Roanoke river, as per agreement when you were here, for $800, in two notes, 12 and 18 months from date, with interest from date, with such security as L. S. Webb says is sufficient for the amount. I am unable to get over, but you may consider it a trade, you complying with the above. You can get your notes fixed as above stated; show them to L. S. Webb, and get a letter from him, to me, stating that the security is sufficient, and all will be right; then I will give you a right to the timber as per agreement." Signed by defendant.

"P. S. I have enclosed the two notes to L. S. Webb for you to fill up." J. H. B.

"I will be at home Saturday next, or any day this week, or you can write to me what day you will come, and I will be here. Signed, J. H. B."

The letter addressed to the plaintiff, with two blank notes,

were, in a day or two, delivered to the plaintiff, who remarked, that he and defendant had made the trade as stated in the two letters. He said further, on the occasion, that he would have the notes signed, and return with them a letter from Mr. Webb as requested, or go over and deliver the notes to defendant.

On the 19th of February, in the same year, one Wynn called on the defendant and offered him one thousand dollars for the timber in question.

On 22nd of the same month, (Feb'ry) the defendant wrote to Mr. Webb as follows:

"WILLIAMSTON, 22d of February, 1853."

"Sir:—I enclosed two notes to Mr. Mizell to sign, and directed him to let me hear from him. Not hearing from him, or seeing him, I promised it to another man, presuming from his conduct, that he has abandoned the trade. The other man has been waiting for some time, and has been urging me to say what I will do with him. I put him off for some time, until Mizell could come or write, and he has not not done either." Signed by the defendant.

This letter was received the day it was written. About twelve days after it was received, the plaintiff called on Mr. Webb, with the notes signed, and the latter gave him a letter to the defendant, stating that the notes were good beyond doubt. At the same time, Mr. Webb communicated to plaintiff the contents of the defendant's letter of the 22nd of February, not having had an opportunity of doing so sooner. The plaintiff, thereupon, stated as his reason for not returning sooner with the notes, that his wife had been very sick, and that there was, and had been, a freshet in the Roanoke river, which prevented him from getting over to Williamston. The plaintiff thence proceeded to visit the defendant at his residence, going a circuitous way to avoid the difficulties of the flood in the river. He lived in Bertie county, about twenty-two miles, by the usual route, from the defendant, the latter took the letter containing the notes, and having read them, returned the notes to the plaintiff, and put the letter in his

pocket, refusing to make a title to the trees. No reason was given by him, at the time, for refusing to complete the trade, but as soon as the plaintiff left him, he put his refusal, upon the ground, that the notes were not good.

Mr. Webb testified that the notes were abundantly good. Shortly after this interview and tender, the defendant conveyed the timber trees to Wynn.

Defendant resisted the plaintiff's recovery,

1st. Upon the ground, that the evidence showed only a proposition on the part of the defendant to sell, but no acceptance of the terms previously to the sale to Wynn.

2nd. The defendant had the right, at any time, to withdraw his proposition before its acceptance by the plaintiff, and in his second letter to Mr. Webb, had done so.

3rd. The plaintiff did not tender the notes in a reasonable time.

4th. The contract was not written so as to comply with the statute of frauds.

The Court, by agreement, reserved the foregoing points.

The jury found a verdict in favor of the plaintiff for $200 with interest from the sale to Wynn, it being admitted that such was the proper amount of damages, if plaintiff was entitled to recover at all.

Afterwards the Court decided the questions reserved in favor of the plaintiff, and gave judgment on the verdict, from which defendant appealed to this Court.

Winston, Jr., for plaintiff.
Heath, for defendant.

Pearson, J. It was properly conceded that a contract to sell "growing trees" is within the statute of frauds, being a contract to sell "land or some interest in, or concerning the same."

We are of opinion with his Honor, that to make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary

that it should also be signed by the vendee. The statute provides that the contract shall be signed by the "party to be charged therewith." This answers the purpose, which is to exclude perjury in an action to enforce the contract. In reference to the other party the statute is silent, and there is consequently nothing to justify the construction, that he is also required to sign. If the purchaser of land pays the price in cash, taking a bond for title, there is no reason why he should put his signature to the contract. So, if he gives a note for the price, that is sufficient, although the note make s no refer ence to the contract. So, if the vendor binds himself in writing, and is content to take the verbal promise of the purchaser to pay the price, it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound, but the other party cannot be charged if he chooses to insist upon the statute. Common justice, and the general principles of law, require that there shall be a mutuality in contracts; that is, if one party is bound the other ought to be. But there may be exceptions. Although it is a maxim that a contract is never binding unless there be a consideration, yet, there is a distinction between a consideration and the mutuality of contracts in reference to the obligation thereof, and the fact that by some other principle of law, or the provisions of a statute, one party has it in his power to avoid the obligation, although it suggests a very forcible reason for not entering into a one sided contract, does not necessarily have the effect of making such contract void as to both parties. One agrees to deliver, at a future day, a certain article to an infant, in consideration of his promise to pay the price, the contract is not void, although the infant may avoid the obligation on his part, if he chooses to protect himself on the ground of infancy. So, if one agrees in writing to convey land in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor, although the vendee may avoid the obligation on his part if he chooses to protect himself under the provisions of the statute. It is not considered, in either case, that the contract

is *nudum pactum* and void for the want of consideration. This is the result of the English decisions in reference to the statute of frauds, and although our statute is not precisely in the same words, yet the substance is the same, the purpose is the same, and the difference in the wording is not such as to justify a difference in the construction; *Laythoarp* v. *Bryant*, 2 Bing. N. C. 744, (29 Eng. Com. L. Rep. 469); *Allen* v. *Bennet*, 3 Taunt. Rep. 170.

We also agree with his Honor, that the letter of the defendant to the plaintiff, dated February 14th, 1853, is a sufficient writing, or memorandum of the contract, to bind the defendant and subject him to an action for a breach, provided there be no other difficulty in the way of the plaintiff. The writing being required only as *evidence* of the contract and not to constitute it. This is well settled, both in Law and Equity; *Jackson* v. *Lowe*, 1 Bing. 9; *Bateman* v. *Phillips*, 15 East 172; *Laythoarp* v. *Bryant*, supra; 3 Atk. 503, 1 Vern. 110. According to the view we take of the case, it is not necessary to decide whether the letter of the 14th of February, above referred to, is only a proposition to sell, or contains in itself the contract, or is evidence of a contract previously made; for, in either view, the plaintiff was required to execute the two notes with approved security, and the only question is, whether he did execute and tender them to the defendant in time to perfect his right of action.

If the plaintiff had tendered the notes on the Saturday referred to, or any day during that week, it is clear that the defendant would have been bound. There is strong ground to support the position, that according to the proper construction of the letter, the plaintiff was required to deliver the two notes during the week, or at all events, to *write* during the week, and fix on a day—the purpose being not to let the matter stand open and leave him unbound longer than that week. It would seem the defendant wrote this letter reciting the agreement or purpose to bind himself in writing, with the expectation that the plaintiff was also to bind himself during that week. But we put our decision on a broader ground. The plaintiff was cer-

tainly required to deliver the notes within a reasonable time, and we think a delay of twenty days was, under the circumstances, unreasonable, and consequently the plaintiff did not, by his tender of the notes, acquire a right of action.

What is a reasonable time must, in all cases, depend upon the circumstances. The nature of the transaction may make a delay unreasonable, which, in a transaction of a different kind, would not be so. According to the law-merchant, notice of the dishonor of a bill must be by the return mail, for "promptness is the life of trade." So, if one offers to take one hundred dollars for his horse, the proposition must be accepted *at the time;* for nothing else appearing, his object is to sell at that time. So, the question may depend upon the condition of the parties. If one is bound, and the other is *foot-loose*, the time must be short, for it would be unreasonable to keep the parties in so unequal a condition for a long time. This is our case. The defendant was bound in writing, the plaintiff was *foot-loose.* If a storm had destroyed the trees, he was not bound to complete the trade, even after his conversation with Webb, and it was unreasonable to delay twenty days, and then seek to get the advantage of an appreciation in the value of the timber, or of the fact, that it was worth more by some $200, at the time of the contract, than the owner supposed.

This delay was the more unreasonable, because the defendant earnestly insisted that the business should be closed on the next Saturday, or some day during that week, which ought to have quickened the plaintiff's diligence.

The suggestion that the delay was occasioned by the sickness of the plaintiff's wife, and the freshet in the river, will not avail. Assuming that she was sick, it does not appear how that made it *impossible* for him to procure the notes. As to the river being up, that did not prevent the defendant's letter of the 22d, from reaching its destination, and the plaintiff could have crossed in the same way. Nor did it prevent him from crossing to make the tender. It is true, he went a round-

about way, but his being able to do so, repels the idea of an impossibility.

But in the second place, it is familiar learning that a right, depending upon a condition precedent, does not accrue unless the condition be performed, although performance becomes impossible by the act of God. There is a diversity between a condition subsequent by which an estate is to be defeated, and a condition precedent by which an estate is to be created, or a right is to accrue. Co. Litt. "Conditions."

The defendant agreed to convey the timber to the plaintiff, provided he executed the notes in a reasonable time: The principle is the same as if the condition had been to execute the notes in ten days. Performance is necessary to give a right of action.

PER CURIAM. There is error. Judgment reversed, and *a venire de novo.*

COHOON & McINTOSH *v.* ROBERT MORTON, *et. al.*

There is no necessity that an appellant should himself sign, or otherwise execute, the appeal bond.

Where a judgment and a ca. sa. upon it were taken in the name and behalf of "A and B," a firm, and a ca. sa. bond taken, made payable to the same firm, upon the defendant's default, it was *held*, that no judgment could be rendered on such bond in the name of certain individuals claiming to be the persons meant by "A and B;" nor in any other manner; for, "A and B," not being a corporation, cannot be recognised in legal proceedings.

THIS was a motion for judgment on a ca. sa. bond, heard before his Honor, Judge BAILEY, at a special Term, 1854, of Pasquotank Superior Court.

The judgment upon which the ca. sa. issued, was in favor of Cohoon & McIntosh for sixty dollars, rendered by a justice of the peace. The ca. sa. issuing thereon pursued the judgment, which was in the name of Cohoon & McIntosh, as

plaintiffs. The bond given for the defendant's appearance, under the ca. sa., was payable to Cohoon & McIntosh, and recited the ca. sa. simply as it was, without any explanation of the name and style of the obligees. At the term of the county Court, to which the defendant was bound to appear, the defendant moved to *quash* the ca. sa., and dismiss the proceedings; which motions were sustained by the Court; from which judgment the plaintiffs appealed, and gave bond for the appeal, with sufficient sureties. The appeal bond was signed by the plaintiffs, as "Cohoon & McIntosh."

In the Superior Court, the defendant moved to dismiss the appeal, upon the ground that the signature by the plaintiffs was a nullity; which motion was refused.

The plaintiffs then were allowed to call the principal obligor in the ca. sa. bond, who made default; whereupon the plaintiffs moved for judgment, in the names of P. A. R. C. Cohoon and R. H. McIntosh, which was allowed, and judgment entered accordingly; from which the defendant appealed to this Court.

Smith and *Martin*, for plaintiffs.
Pool and *Jordan*, for defendants.

Battle, J. The motion made by the defendants in the Superior Court, to dismiss the appeal, was properly over-ruled. It was not necessary that the appeal bond should have been signed by the plaintiffs at all, and of course it did not invalidate the bond, as to the other obligors, that they signed as "Cohoon & McIntosh." In the case of *Woollard* v. *Woollard*, 8 Ire. Rep. 322, it was held by the Court, that where the appellant in a suit failed to prosecute it with effect, the appellee might "take a judgment against the principal, upon his liability as a party to the suit, and then another and separate judgment against the sureties on the bond; or he might take a joint judgment against the principal and his sureties on the bond. We are unable to perceive any advantage which the appellee could have by taking a joint judgment; and we are

therefore of opinion that an appeal bond executed by the sureties only, would be sufficient to sustain the appeal.

The motion of the plaintiffs for a judgment against the defendants, Morton and his sureties, on his appearance bond, ought likewise to have been over-ruled. This bond was taken, payable to "Cohoon & McIntosh," and the motion for judgment was made in behalf of P. A. R. C. Cohoon and R. H. McIntosh, partners in trade, trading under the firm and style of Cohoon & McIntosh, and the judgment was given accordingly. This was, we think, erroneous. In the care of *Smith* v. *Shaw*, 8 Ire Rep. 233, the Court intimate the opinion that a declaration upon a *sci. fa.*, reciting a bail bond executed in a suit brought and prosecuted to judgment, by John Smith, Joseph P. Smith, and William G. Smith, trading and acting under the name and style of John Smith & Co., would not be sustained by proof of a bail bond given in a suit brought in the name of Smith & Co. If this be so, and we think it is, then the cases of *Williams* v. *Bryan*, 11 Ire. Rep. 613, and *Earle* v. *Dobson*, 1 Jones' Rep. 515, are directly in point to show that P. A. R. C. Cohoon and R. H. McIntosh, partners in trade, and trading under the firm and style of Cohoon & McIntosh, could not have a judgment upon a bond payable simply to "Cohoon & McIntosh." These persons are not a corporation, and are not to be recognized in legal proceedings, unless it is stated who they are, and how they claim to be acting under a particular name and style. The judgment is erroneous, and must be reversed.

PER CURIAM. Judgment reversed.

State to the use of ABSELLA HOELL *v.* HARDY B. COBB, *et. al.*

Under the 9th section of 79th chapter of Revised Code, a bond given by one at October Term, 1851, conditioned for his faithful discharge of the duties of an office for one year from the date, can be recovered on, notwithstand-

ing the office expired at the January Term, 1852, and the breach was subsequent to that term.

The cases of *State* v. *Burcham*, 11 Ire. Rep. 436, and *State* v. *Lane*, 13 Ire. Rep. 253, commented on and explained.

ACTION of DEBT on a constable's bond, tried before his Honor Judge MANLY, at the Spring Term, 1857, of Martin Superior Court.

Cobb, the principal defendant, was appointed constable, at October Term, 1851. The plaintiff declared for a breach of the bond of the year then ensuing. It was in the usual form, with the conditions required by law.

The relator of the plaintiff, in February, 1852, had put into the hands of Cobb, the constable, claims to be collected, and he had negligently failed to collect them.

The appointment of Cobb was as follows:

"Ordered by the Court that Hardy B. Cobb be appointed constable in district No. 4, upon his entering into bond, according to law, with Joseph Waldo, &c., his securities."

The plaintiff then read in evidence a private Act of Assembly, passed in 1838, chapter 15, page 108, giving the County Court of Martin power to elect constables.

The defendant contended that, by the provisions of the act of 1538, the County Court of Martin should appoint constables at the January Term in each and every year, and that the appointment at the October Term, 1851, expired at the January Term, 1852.

There was a verdict for the plaintiff, subject to the opinion of the Court upon the question of law, which was reserved by consent, with leave to set aside the verdict, if his Honor, should he be of opinion against the plaintiff.

Afterwards, upon consideration, the Court ordered the verdict to be set aside, and gave judgment for the defendant.

Plaintiff appealed.

B. F. Moore, for plaintiff.

Winston, Jr., for defendant.

Battle, J. We agree with the defendants' counsel in the construction which he puts upon the private Act of Assembly passed in 1838, (ch. 15,) giving to the County Court of Martin the power to elect constables, and we assent to the proposition that the appointment of the defendant as constable, at the October Term, 1851, expired at the following January Term, 1852. *State* v. *Burcham*, 11 Ire. Rep. 436; *State* v. *Lane*, 13 Ire. Rep. 253. We are nevertheless of the opinion that, by force of the 9th section of the 79th chapter of the Revised Code, the relator is entitled to recover. This Act was passed originally in 1842, and it provides that "whenever any instrument shall be taken by, or received under the sanction of, a court of record, or by any persons acting under, or in virtue of, any public authority, purporting to be a bond executed to the State for the performance of any duty, belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring of the office, or in making of the appointment, or any variance in the penalty, or condition of the instrument, from the provisions prescribed by law, shall be valid, and may be put in suit in the name of the State, for the benefit of the person injured by a breach of the condition thereof, in the same manner as if the office had been duly conferred, or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law." The present case certainly comes within the spirit, if not the very letter of the Act. The defendant, Cobb, was appointed a constable by the County Court of Martin, which is a court of record, at October Term, 1851, *for one year*, and, thereupon, executed a bond with the usual conditions, which recited his appointment *for one year*, and the other defendants became his sureties to the said bond. His office expired at the January Term, 1852, so that the appointment was invalid for the residue of the year; yet the act says that the bond shall, notwithstanding, be valid, and may be put in suit in the name of the State, for the benefit of any person injured by a breach of the condition. The relator was injured by the defendant

Cobb's taking her claims to collect, as an officer, and by his negligence in failing to collect them within the year for which his appointment purported to have been made. Her right to recover seems to be within the express provisions of the law.

But it is contended that the cases of the *State* v. *Burcham*, and *State* v. *Lane*, above referred to, are decisions directly in point against this conclusion. Of the latter of these cases, we have only to remark, that the facts upon which the rights of the parties depended, occurred before the Act was passed, and, of course, could not be affected by it. The former occurred after the Act went into operation, and it is, therefore, apparently an authority against us. But it is so in appearance only; for, upon an examination of the transcript of record as sent up to this Court, we find that it is not so in reality. It will be noticed that, in the report, the facts of the case are not stated, either by the Reporter, or the Judge who delivered the opinion of the Court. The transcript shows that the appointment of Burcham as constable was made at the May Term, 1843, of Cartaret County Court, in the following words: "Ordered that Shepperd W. Burcham be appointed constable for the Beaufort district, by his giving William S. Ward, Rufus Ward, and Benjamin Mace, as securities in a bond of $4,000." The condition of the bond given, recites that "whereas the above bounden Shepperd W. Burcham has been appointed a constable in the county aforesaid, now, &c." Nothing is said either in the order of appointment, or in the bond, about the duration of the office. The Judge in the Court below decided that the office expired in the following February, and that no recovery could be had upon the bond for claims put into the principal defendant's hands after that time. The judgment was affirmed by this Court; but it does not appear that the Act of 1842 was brought to the attention of the Court, and it certainly is not noticed in the opinion filed. This case, therefore, cannot stand in the way of our putting upon the Act what we believe to be its true construction.

The principle which we have here enunciated will, we believe, be found to be sanctioned by an able opinion of Chief Justice MARSHALL, delivered the case of the *United States* v. *Manin*, and reported in 2 Brockenborough's Rep. 96. It was there held that "an official bond given by an agent of fortifications, whose *appointment* was irregular, but whose *office* was established by law, though void as a statutary obligation, was valid as a contract to perform the duties appertaining to the office of agent of fortifications, and was binding on his sureties. The judgment of nonsuit must be set aside, and a judgment rendered for the plaintiff.

PER CURIAM. Judgment reversed.

ROBERT G. NIBLETT *v.* JAMES HERRING.

Where there is an entire executory contract, and the plaintiff has performed a part of it, and without legal excuse, and against the consent of the defendant, refused to perform the rest, he cannot recover any thing for the part performed.

ACTION of ASSUMSIT, tried before his Honor, Judge ELLIS, at the Spring Term, 1857, of Bertie Superior Court.

The suit was begun by a warrant before a justice of the peace, and brought up by appeal. The plaintiff declared, in several counts, for the services of a boy about fifteen years old; whom he had hired to the defendant for the year 1856, at the price of fifty dollars. The proof was that the boy served the defendant about seven months, and then left his employment. There was evidence tending to show that the boy was taken away from the defendant by the plaintiff, against the will of the former.

The Court instructed the jury, that if the plaintiff took the boy away against the wishes of the defendant, that he was not entitled to recover any thing. Plaintiff excepted.

Verdict and judgment for the defendant, and appeal to this Court.

Heath, for plaintiff.
Winston, Jr., for defendant.

Nash, C. J. The charge of his Honor is in strict conformity with repeated decisions of this Court, of the Courts of England, and of our sister States, where the question has been canvassed. The principle is, that where there is an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refused, without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing, either on the special or general assumpsit. 2nd vol. Smith's Leading cases 13, in the note: Upon the principle that where the contract is special, an action for its breach must, in general, be brought on the special contract. While it is open and unperformed, no action can be sustained for work and labor done. *Cutter* v. *Powell*, 6 Term Rep. 320; *Jennings* v. *Camp*, 13 John. Rep. 94.

The cases in this Court are *Fesperman* v. *Parker*, 10 Ire. Rep. 474; *Winstead* v. *Reid*, Busb. Rep. 76, and *White* v. *Brown*, 2 Jones' Rep. 403. The last two cases in particular, cover the whole ground. The former was brought by a carpenter against his employer for work and labor done upon a house at a stipulated price. He commenced the work, and, when it was half finished, abandoned it, without the consent of the defendant, the employer. The action was upon the common count for work and labor done. The decision was, that he could not recover. The latter was more analogous to this. The defendants had a contract upon the rail road, and hired from the plaintiff, for the time they should be engaged in the work, several slaves, at a stipulated price per month. Before the work was finished, the slaves were taken home by the plaintiff, without the consent of the defendant; and the action was brought on the common count to recover for the time they had worked. Judgment was rendered

against the plaintiff. In our case, the contract is a special one for the hire of a boy, for one year, at an agreed price. Before the end of the year, the plaintiff took the boy home, as was alleged, against the wishes of the defendant. This point being controverted, it was left to the jury to decide, his Honor instructing them, that if the plaintiff did take away the boy, he could not recover. To this charge there can be no legal exception.

PER CURIAM. Judgment affirmed.

STATE *v.* HARRIET, *a slave.*

Under the 34th ch., section 36, and 107 ch., secs. 31, 32 and 34, of the Revised Code, the Superior Courts have not original jurisdiction of the offence of grand larceny committed by a slave.

This was an INDICTMENT for GRAND LARCENY, tried before his Honor, Judge PERSON, at the Spring Term, 1847, of Bladen Superior Court.

Upon motion by the defendant's counsel, his Honor gave judgment to quash the indictment, on the ground that the Superior Court has no original jurisdiction of larceny committed by a slave. From which judgment the solicitor for the State appealed.

Attorney General, for the State.
Shepherd, *Baker* and *White*, for defendant.

NASH, C. J. The prisoner, a slave, stands indicted in the Superior Court of Bladen for grand larceny. On the trial below, the defendant's counsel moved to quash the indictment for want of jurisdiction. The prosecution is founded on the 107th chapter of the Revised Code. The motion to quash rests upon the construction of that chapter, and of the 26th

section of the 34th chapter. By the law, as it stood before the Act of 1856, (Rev. Code,) a single magistrate had exclusive jurisdiction of all misdemeanors, or offences committed by slaves, which are not declared by law to be capital, and which, in the opinion of the justice, before whom such offending slave may be carried, shall appear of such a trivial character as not to deserve greater punishment than a single magistrate can inflict. The County Courts were invested with original and exclusive jurisdiction over all offences committed by a slave of a higher degree than such as are cognizable before a single magistrate, except in cases where the punishment may extend to life, and also felonies within the benefit of clergy. To the Superior Courts was given original and exclusive jurisdiction over all offences committed by a slave, the punishment whereof might extend to life, and clergiable felonies; Rev. Stat., ch. 111, sec. 41, 42, 43. By that statute, the original cognizance of crimes and misdemeanors committed by slaves, were entrusted to three distinct tribunals—to the Superior Courts, where the crime affected life, and clergiable felonies—to the County Courts, petit larceny and the higher class of misdemeanors—and to a single justice of the peace, the most inferior class. The Revised Code has, as to most of these offences, reduced the original jurisdiction to two—the justices out of Court, and the Superior Courts. By the Revised Code, ch. 107, sec. 31, the Legislature describes, as well as the nature of the subject will admit, the offences of slaves of a minor grade, and the 32nd section gives to a single justice jurisdiction over all the offences so enumerated or described, and "all other misdemeanors done by slaves, mentioned in this chapter, the prescribed punishment whereof is whipping." The 34th section, then provides—"the Superior Court shall have exclusive original jurisdiction of all felonies and other offences committed by slaves, which, by section 32, are not assigned for trial before a justice of the peace, &c."

All offences of slaves, then, which do not put their lives in jeopardy, are punishable by a single magistrate. The

crime for which the prisoner is indicted is, or was, grand larceny. Between it and petit larceny the common law made a wide difference. The former was punishable with death, unless the prisoner was entitled to the benefit of clergy; the latter being punished by whipping. Morally speaking, there is no difference; each is equally forbidden by the great Lawgiver. All that relates to the mode of securing society against the commission of such offences is of man's invention, and may be varied as sound discretion may direct. This has been done in this State by the 26th section of the 34th chapter of the Revised Code. It provides—"all distinction between petit larceny and grand larceny, where the same hath now the benefit of clergy, is abolished, and the offence of felonious stealing, where no other punishment shall be specifically prescribed, shall be punished as petit larceny is." We have seen that by the 32nd section of the 107th chapter, petit larceny is punishable by a single justice. The act of 1856 has not raised petit larceny to the grade of grand larceny, but has brought the latter down to that of the former. A change which the spirit of the times demanded. When a slave steals to an amount which, by the common law, would have constituted grand larceny, the offence is cognizable before a single justice, and the Superior Court is ousted of its jurisdiction by the express terms of the Act.

There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

JESSE C. JACOCKS *v.* NATHAN NEWBY.

Under the 104th ch., sec. 33 and 35 of the Rev. Stat., a petitioner who has acquired a right, by order of the Court, to have a cart-way over the land of another, and who has afterwards obtained title to the servient tenement, has a right to obstruct and discontinue such cart-way.

Action on the case for obstructing a cart-way, tried before his Honor, Judge Ellis, at the Spring Term, 1857, of Perquimons Superior Court.

It was in evidence in the Court below, that the defendant was the owner of a tract of land in Perquimons County, over which passed a road or way, from a public highway to a farm owned by the plaintiff, over which he habitually passed in going to, and returning from his farm; that there was another way by which he could have gone to and from the said farm, to the same highway, but the same was five miles further than the road in question. It was also in evidence that the defendant obstructed the road in question so that the plaintiff could not pass over it.

There was also evidence of the proceedings of the County Court of Perquimons, laying off a cart-way over the lands of one Carter and one Sutton, at the instance of one Blount, so as to enable him (Blount) to reach the public highway over these two tracts. Blount, for his own convenience, continued the road, thus ordered to be laid out, across his land, where it reached the land of the plaintiff, and was the road, as above mentioned, used by him.

The two tracts of land owned by Sutton and Carter had been, subsequently to the laying off of the said cart-way, and before the obstruction complained of, conveyed to an ancestor of the defendant, the owner of the Blount land, and thence all the said three tracts, (the Blount, the Sutton, and the Carter tracts,) became the property of the defendant.

The obstructions complained of were on the Carter and Sutton, as well as the Blount portions of the defendant's land. The plaintiff showed special damage by reason of the obstruction of the said cart-way.

The Court instructed the jury that the plaintiff, having shown special damage to himself, was entitled to recover, as the defendant had no right to stop up the cart-way; that, under the statute, a cart-way, when once opened, is to be kept open, and all persons have a right to pass over it, as well as he upon whose petition it was established; that it is not strict-

ly a private way, vesting exclusively in the petitioner, but that the public also have a right to use it, and it cannot be closed by authority of law, in the manner prescribed by statute for discontinuing other roads; that the cart-way was not merged and lost to the public by the defendant's purchasing the lands over which the cart-way was laid off. To this instruction defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Heath and *Pool*, for plaintiff.

No counsel appeared for defendant in this Court.

Battle, J. The facts of this case occurred before the Revised Code went into operation, and it depends upon the proper construction of the 33rd and 35th sections of the 104th chapter of the Revised Statutes. The former of these sections prescribes the manner in which a person, settled upon or cultivating land, may, under certain circumstances, have a cart or wagon-way laid out, and kept open over another's land; and the latter declares, that when so laid out, it "shall be free for the passage of any person or persons to pass."

The counsel for the plaintiff contends that, when the cart, or wagon-way is opened under the provisions of this act, the public acquires such an interest in the use of it, that the land-owner, at whose instance it was laid out, cannot close it, even though he acquires, by purchase, or descent, the land over which it passes. Of this opinion was his Honor in the Court below; but upon a full consideration of the object of the act, and the various provisions by which that object is sought to be accomplished, we feel ourselves constrained to dissent from it.

The purpose which the Legislature had in view is obvious. It was to give to certain persons, settled upon, or cultivating, land, who had no convenient way to or from such land, except by passing over the lands of other persons, the means of travelling to and from market and other places with their

carts and wagons. It is manifest that this purpose would not be fully accomplished without giving to others, besides the owner of the dominant tenement, the right of passing over the cart, or wagon-way. He might wish to buy as well as sell, and to be visited as well as to visit, and he would often be put to serious inconvenience if other persons could not come to his land with their vehicles, without being guilty of a trespass by passing over the servient tenement. Hence the necessity of the provision, that the cart, or wagon-way "shall be free for the passage of any person, or persons." It was to the interest of the owner of the dominant tenement that it should be so, and we are bound to suppose that it was his interest alone which the law-makers had mainly, if not altogether, in view; because the way was to be opened, and kept open, at his sole expense; his hands not even being, in consequence thereof, exempted from working on the public roads.

If, after the cart or wagon-way was thus opened, he should, by any means, acquire the title to the servient lands, his right to use the way, under the statute, would merge in his superior right of using his own land as he pleased. Such would undoubtedly be the case if he had acquired the right of way by grant, or prescription, (3 Cruise Dig. Tit. Ways, sec. 24; *Whalley* v. *Thompson*, 1 Bos. and Pul. 371,) and we can see nothing in the policy of the statute to prevent the application of the same well-known principle to a right of way acquired under its provisions. If so, the right of the public, which was merely incidental to his, would be lost with it. And it is clearly proper that it should be so, else the public would have had, under the Revised Statutes, a more permanent interest in a private cart-way, than they had in a public road. The latter might, by the first section of the Act, be altered or discontinued, but there was no such provision for the former, though that is now remedied by the 38th section of the corresponding (101st) chapter of the Revised Code. These considerations lead us to the conclusion that, where the defendant acquired the lands over which his cart or wagon-way passed, the right to it was extinguished and gone, not only as to

him, but as to all other persons, and that, therefore, the plaintiff had no cause of action against him for obstructing it. The judgment must be reversed, and a *venire de novo* awarded.

Per Curiam. Judgment reversed.

HARLAN & HOLLINGSWORTH *v.* THOMAS C. SMITH.

Where the fact is assumed that the property of the plaintiff came to the defendant's possession, and was used by him, and no question is raised as to the nature and terms of the contract of purchase, a letter ordering the property to be sent was not necessary evidence, and it was not error to proceed without it.

Action of assumpsit, tried before Person, J., at the Spring Term, 1857, of Bladen Superior Court.

One Rothwell was examined as a witness for the plaintiffs, who swore that he was the agent of the defendant to buy the machinery, for the price of which this suit was brought, and that he wrote to the plaintiffs, who lived at Wilmington, Delaware, ordering it. The machinery came, according to order, to Wilmington, North Carolina, and was delivered by the witness to the defendant in good order, accepted by him, and put on board of a boat and carried to his residence, up the Cape Fear River. This witness was a machinist, and proved the quality and value of the machinery.

The defendant objected to any proof of the purchase by Rothwell, as agent, unless the letter which he wrote to the plaintiffs was produced. The objection was over-ruled, and defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

E. G. Haywood and *Baker*, for plaintiff.
Troy, for defendant.

Nash, C. J. This is a very plain case; so plain that it was not in the power of the ingenious counsel who argued it for the defendant, to cast any doubt upon it. The action is brought to recover the price of some machinery. The defendant employed a Mr. Rothwell to purchase for him the machinery in question, who ordered it, by letter, from the plaintiffs. The defendant's counsel objected that the letter itself was the best evidence, and must be produced. The objection was over-ruled. We do not deem it necessary to examine the doctrine of the best evidence. But very certainly, the rule does not apply to this case. *Currie* v. *Swindell*, 7 Ire. Rep. 361. It is distinctly set forth that the machinery arrived at Wilmington according to order, and was, by Mr. Rothwell, the agent of the defendant, received, and by him delivered, in good order, to the defendant, who took it to his plantation on the Cape Fear river. No special contract was made, and the money is sought, under the common count, for goods sold and delivered. Whether, therefore, the order was given by letter, or verbally, was a matter of no moment, and the production of the letter was unimportant. Suppose the plaintiffs had had the machinery lying upon the wharf at Wilmington, and the defendant had taken it into his possession, without the knowledge or consent of the owners, could not the latter have maintained an action of assumpsit for the value of the article? The defendant has the property of the plaintiff in his possession and use, and must pay for it. We cannot conceive that, in affirming the judgment, we are in any measure weakening the valuable rule of evidence, that the best, the nature of the case admits of must be produced; or that we are opening the door for the fearful consequences so forcibly pictured before us.

We see no error in the judgment of the Court below.

Per Curiam. Judgment affirmed.

Doe on the demise of DOCTOR F. MANN *v.* WILLIAM H. TAYLOR.

Where the beginning call in a grant is for a stake, and all the rest of the description is course and distance, the location of the land is impossible, on account of the vagueness of the description.

ACTION of EJECTMENT, tried before CALDWELL, Judge, at Spring Term, 1856, of Stanly Superior Court.

The plaintiff adduced title to the land in question, from the sovereign, by a grant from Gabriel Johnston, Esq., one of the provincial Governors, to Arthur Dobbs, and then introduced testimony to establish a possession of seven years, under color of title.

The grant to Arthur Dobbs contained the following description, viz: "A tract of land containing twelve thousand five hundred acres, being subdivided from tract No. 2, surveyed by Matthew Rowan, Esq., upon the branches of the great Pee Dee and Johnston Rivers, beginning at a stake, running thence north five hundred chains, thence west two hundred and fifty chains, thence south five hundred chains, and thence east two hundred and fifty chains to the first station, and bounded by the tract R. to the south and east, and T. to the west."

The counsel for the defendant moved the Court to instruct the jury that the Dobbs grant was void for uncertainty, and could not be located, which was declined by his Honor, for which the defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

No counsel appeared for the plaintiff in this Court.
Moore and *Bryan*, for defendant.

PEARSON, J. The objection in regard to the location of the grant to Dobbs, is fatal to the plaintiff's claim, and it is unnecessary to advert to any of the other points made in the Court below.

The grant has two descriptions: First, it is a grant of

12,500 acres, being a subdivision of tract No. 2, and it is bounded by tract R. on the south and east, and by the tract T on the west. If the tracts R and T could be identified, this description, under the rule *id certum est quod certum reddi potest*, would be sufficient to make out a location of the tract in question, by aid of the fact, that it is a paralellogram, which having three sides known, the fourth could be ascertained ; but no proofs were offered for the purpose of identifying the tracts R and T. So this description may be put out of the case.

The second description is in these words: "Beginning at a stake, running thence north 500 chains, thence west 250 chains, thence south 500 chains, thence east 250 chains, to the first station." A *stake* is an imaginary point. There is no telling where it is. So, the grant has no beginning, this description being void on account of its vagueness ; *Massey* v. *Belisle*, 2 Ire. Rep. 177. That was a stronger case than this ; for the "stake" at the beginning, was in Gillespie's line ; the next "stake" was in Hay street ; the third "stake" had no description, and the fourth "stake" was in Gillespie's line. The Court say, "according to this description, its location was impossible, because, in law, it covered no land." "It is a settled rule of construction with us, that when stakes are mentioned in a deed simply, or with no other description but that of course and distance, they are intended to designate imaginary points. Every corner in this description is a *stake* or imaginary point;" "two are said to be in Gillespie's line, and one in Hay street, but in what part of Gillespie's line, or in what part of Hay street, the points are, can neither directly nor indirectly be discovered from this description."

In our case, the beginning is at a stake ; in other words, at a point, and the other corners are points at the end of course and distance ; so we have points with no other description than that of course and distance, and the main point, or beginning has no other description whatever. There is error, and there must be a *venire de novo*.

Per Curiam. Judgment reversed.

JOHN L. ATKINS *v.* DANIEL McCORMICK.

In a contest as to the right of administration, there are strictly no plaintiffs or defendants. All applicants are actors, and some may withdraw and others come in, at any time during the progress of the cause, even after an appeal from the County to the Superior Court.

The next of kin of a deceased person, after the widow, have the right amongst them of administration on the estate of a deceased relative, but this right is not vested in one more than another, and the degree of propinquity does not give a legal priority. The Court should select from the class, the person best qualified to take care of the estate.

THE case was an application for letters of administration on the estate of Alexander Clark, dec'd., heard before PERSON, J., at the Spring Term, 1857, of Harnett Superior Court.

At the September Term of the County Court of Harnett County, Daniel McCormick claimed the right of administering, as the appointee of Catharine Clark, wife of Malcom Clark, she being a sister of the deceased.

The deceased left no widow nor child or children, nor the descendants of such, and left no brother or sister, except Mrs. Clark. He left nephews and neices, the children of a deceased sister, who were, and still are, in Scotland.

At the same time, John McDougald was an applicant upon the claim of kindred to the deceased.

Malcom Clark had joined in the appointment of McCormick, but it appeared that he was incompetent either to administer the estate, or to join his wife in making such appointment, though she herself was competent to make the appointment.

The County Court gave the administration to McDougald, from which order McCormick appealed to the Superior Court. In that Court, at Fall Term, 1856, McDougald withdrew from the contest, and John L. Atkins, who was in no wise related to the deceased, made application as the appointee of the next of kin in Scotland. The Superior Court gave the administration to Atkins, and McCormick appealed.

Haughton, *McKay* and *Kelly*, for plaintiff.
Shepherd, for defendant.

Nash, C. J. This is a contest as to the administration on the estate of Alexander Clark, deceased. He resided, and died, in Harnett County, without issue, or a widow, and left a sister, the wife of Malcom Clark, living in that County, and nephews and nieces, residing in Scotland, the children of a deceased sister. In the County of Harnett, application was made by the present defendant for the administration, as the appointee of Malcom Clark and wife. John McDougald also applied in his own right, as a relative of the deceased. The Court granted the administration to McDougald, and the present defendant appealed to the Superior Court. At the Term to which the appeal was returned, McDougald withdrew from the contest; McCormick again applied, as the appointee of Clark and wife, and the plaintiff intervened, as the appointee of the next of kin in Scotland. The Court appointed the plaintiff administrator, and the defendant appealed.

Since the statute of distributions, it is of little importance to whom the administration of a deceased person's estate is granted, provided he is one of the classes designated in that Act, and is a fit person, and gives the necessary security as required by law; the object of the law being to have the estate taken care of. The Act of the Legislature upon the subject of granting letters of administration, must be familiar to every lawyer, and need not here be repeated *in his verbis*. It is sufficient to say, that it gives the administration to the widow or next of kin, or to the highest creditor when no one of the two previous classes apply. The contest here is between the next of kin who stand in equal degree to the deceased, but not in equal propinquity; and when that is the case, it is a matter of discretion in the Court whom to appoint. The next of kin *have*, *individually*, *no absolute vested right*; *Stoker* v. *Kendall*, Busb. Rep. 242. Each of the contesting parties had a qualified right to the administration, as this right follows the right of property. I say the parties, because the appli-

cants are the appointees of the respective parties, and derive their right to intervene, entirely through their appointments. 1 Hagg. 342; Iredell's Exr. 322. The County Court, in appointing McDougald administrator, was exercising a discretionary power, from which no appeal would have laid, but for the express provision in the Act; Rev. Code, ch. 4, sec. 2. The appeal was properly granted. In the Superior Court, McDougald withdrew, and the *neices and nephews* in Scotland intervened through their appointee, the present plaintiff.

The parties were changed in the Superior Court. Does that work any difference in the progress of the cause, as to the power of the Superior Court to proceed? None whatever. In a contest like this, there are properly no plaintiffs; no defendants. All are actors; all occupy before the Court the attitude of applicants. The Act of 1777 provides that, after the appeal is taken, the Superior Court shall have cognizance thereof, and shall grant letters of administration to the persons entitled to the same. Upon the appeal, the Superior Court acquired jurisdiction of the subject generally. The whole case was before it exactly as it, was in the County Court. Nor is the Court confined, in their selection of an administrator, to the persons who were parties on the record below, but is at liberty to select any other person coming within the Act of Assembly. *Blunt* v. *Moore*, 1 Dev. and Bat. Rep. 10.

We have not taken into consideration the question raised, as to Mrs. Clark's power to appoint, her husband being alive, but incompetent to act. It is not necessary to do so, as the Superior Court did not grant letters to McCormick, her appointee.

We see no error in the judgment of the Court below.

PER CURIAM. Judgment affirmed.

JOHN A. TAYLOR *v.* THE WILMINGTON AND MANCHESTER RAIL ROAD COMPANY.

The right of a ferryman to his toll, is by the common law, and every subtraction from his profits, by carrying his *customers* over the same stream, whether for pay or not, is an injury for which he may recover damages.

The customers of a ferry are those wishing to go along the highway, of which the ferry constitutes a part, and whom he would be bound to transport on being called on by them, and not such as wish to travel from one of the ferry landings to a point out of the highway.

The Act of Assembly, Revised Code, ch. 101, sec. 30, recognizes the common law remedy, and further gives a penalty of two dollars for every transportation of passengers, &c., within ten miles of an established ferry, *if done for pay.*

The object of the private Acts of Assembly in favor of William Dry, passed in 1764, and of Benjamin Smith, in 1784, was to effect a communication between the towns of Wilmington and Brunswick, by means of two ferries and a road over Eagle's island, between them; and the customers to these ferries, would be only those designing to travel along this highway, or a part of it, and would not include one designing to pass from one of the ferry landings to a point on the island not in the highway.

ACTION on the CASE, tried before his Honor, Judge PERSON, at the Spring Term, 1857, of New-Hanover Superior Court.

CASE AGREED.

The plaintiffs declared against the defendants for violating his franchise by carrying persons over the north-east branch of the Cape Fear River, from the town of Wilmington to Eagle's Island. This Island is in the said river, opposite Wilmington, and is more than a mile across. The branch of the river next to Wilmington is called the *North-East River*, and that on the other side of the island, is called the *North-West River*. The dividing line between the counties of New-Hanover and Brunswick is the middle of the Cape Fear River, and divides the island into two parts. The old town of Brunswick, which is now in ruins, stood on the western shore of the *North West*, opposite to Eagle's Island. The plaintiff claimed the sole and exclusive right of carrying persons, &c., across the two rivers, and to charge separately for each ser-

vice, and admitted the obligation of keeping up the road between them. This authority was conferred upon those under whom he claimed, by various Acts of the General Assembly, and was continued by deeds of conveyance down to himself. The portions of the said Acts, material to this question, are as follows:

"*An Act to encourage and empower William Dry to make a public road through the great island opposite to the borough of Wilmington.*"

1. "Whereas a road through the great island, opposite to the borough of Wilmington, will be very beneficial to travellers going to and from South Carolina, and to others going to the town of Brunswick, and up the North West River of Cape Fear, and the said Dry being anxious to make and finish the same,

2. *Be it enacted by the Governor, Council and Assembly, and by the authority of the same*, that William Dry shall, within six months after the passing of this act, stake and lay off, or cause to be staked and laid off, a road through the said island, beginning at his land, on the said island, opposite to *Market* street, in the said borough, and running westardly the nearest and most convenient way across the North West river."

(Section 3rd prescribes the dimensions of the road, and provides for its completion within three years, under a penalty of two hundred pounds.)

4. "And to encourage the said William Dry to make and finish the said road, *be it further enacted by the authority aforesaid*, that, in consideration of the said Dry's making and finishing the road as aforesaid, the ferries to be kept on both sides the North East River, opposite Market steeet, in the borough of Wilmington, and all perquisites and profits therefrom are hereby vested in the said William Dry, his heirs and assigns forever; and the said William Dry, his heirs and assigns, shall, and may hereafter receive for transporting passengers, their horses and effects, over each of the said ferries, the following rates, &c. * * *

7. *And be it further enacted*, that if any persons shall, for fee or reward, contrary to the intent and meaning of this Act, transport, or carry any person, or persons, their horses, carriages or effects, over either of the brances of the Cape Fear river, in order to his or their passing through or over the said island, such person or persons so offending, shall, for every offence, forfeit and pay the sum of twenty shillings, to be recovered by warrant from any justice of the peace. * *

Passed in the year 1764. Vide Martin's Col. of private Acts, 45.

"*An Act to encourage* Benjamin Smith *to repair and complete the bridges and causeways through the great island opposite Wilmington.*

Whereas it appears that the encouragement formerly granted to William Dry for making a public road through the great island, opposite to the borough of Wilminglon, was totally inadequate for the purposes intended, and the inferior Court of Brunswick have unanimously raised the rates of ferriage to and from the beforementioned island, and recommended to the Legislature to grant unto the proprietor of said ferries such encouragement by law as may be necessary to finish a very laborious undertaking, which will be attended with great public utility:

"II. *Be it therefore enacted by the General Assembly*, &c., that Benjamin Smith, his heirs, &c., shall, within three years, finish and complete a good and sufficient road through the island, (specifying the particulars of construction,) under the penalty of £500," &c.

"III. And for the good encouragement of the said Benjamin Smith to finish and complete the road, * * *be it enacted*, &c., that in consideration thereof, he, the said Benjamin Smith, &c., shall, and may, receive for transportating passengers, &c., over the North West and North East rivers, the following rates, * * (specifying the rates,) and for going over one of the said rivers, half the said rates.

"V. (Provides a penalty for the said Smith's failing to

keep the road and its appurtenances in repair, as overseers on public roads are bound.)

"VI. *And be it further enacted*, &c., if any person or persons, shall, for fee or reward, contrary to the intent and meaning of this Act, transport or carry any person, &c., over either of the branches of Cape Fear river, in order to his, or their, passing through, or over the said island, such person * * shall, for each offence, forfeit and pay the sum of five pounds." Passed in 1784. Martin's col. Private Acts, p. 140.

Mesne conveyances from Smith to W. W. Jones, and from him to Cowan, from Cowan to plaintiff, from the plaintiff to the defendants, from them to Shulken & Prigge, and from them back to plaintiff, are put in the case as evidence; but it is not deemed necessary to describe them further than to say, that the deed from the defendants to Shulken & Prigge contains exceptions and reservations, which the defendants contended protected them in the business done by them upon the river, which the plaintiff complains of; but as the decision of the Court turns upon another point, it is not necessary to set forth the exceptions.

It was admitted, in the case agreed, that the defendants are an incorporated company.

That the town of Wilmington, before 1847, did not extend across the river, (the North East,) but since that time, has been so extended as to include all that part of the island belonging to New-Hanover County, within its limits. Within which part of the said island are situated the plaintiff's depot, workshops, offices, warehouses, wharfs, &c., a little above the ferry landing; and that here is the terminus (east) of their rail road.

It is admitted in the case agreed, that, for more than fifty years past, warehouses and wharfs have existed on the eastern side of Eagle's island, within that portion of it now included in the corporate limits of Wilmington, and for more than forty years steam mills have been in use within the same limits, the owners of which warehouses, wharfs and mills, have kept their own boats, and carried over the river from Wilmington

to their places of business, their servants, employees, and all persons who desired to visit their places, on business or otherwise, without any claim on the part of the proprietors of these ferries, for damages, or for any penalty, or forfeiture.

It is agreed that the railroad of the defendants had been completed across the North West river, and across the island, to their depot, situated as above stated, on the 1st of January, 1857, and that since that time, and before the commencement of this suit, the defendants, by means of a boat, did transport across the said North East river many persons, of whom some were their officers, agents, and appointees, passing the said river on the business of the defendants, or their own business, others were persons having business to transact with the officers and agents of the defendants, and others that had no business with the company or their agents, but passed over under that pretence; others were persons that came to attend to the reception of their goods, &c., and to ship the same from the defendants' wharfs on the island; but none of the persons were so transported with a view that they were to use the plaintiff's road, or to pass through the island.

It was agreed that if, upon the foregoing facts, the Court should be of opinion with the plaintiff, a judgment should be rendered for him, and an enquiry of damages be awarded, as upon a judgment of *nil dicit;* but if the Court should be of a contrary opinion, a judgment of nonsuit should be entered.

Upon consideration of the case agreed, his Honor, being of opinion against the plaintiff, ordered a nonsuit, from which he appealed.

Badger, for plaintiff.
Moore and *W. A. Wright*, for defendants.

Pearson, J. What are the rights of the plaintiff as the owner of a public ferry, without reference to the exception in the deed of the defendant? He may recover damages from any one who, without legal authority, erects a ferry across the water between the *same point*, or so near as to draw off

his custom. This is a right at common law, and is put on the ground that, as he is bound to keep up the ferry, he is entitled to such profits as may accrue therefrom in consideration, and as a compensation, for his liability. Consequently any subtraction from the profits is wrongful, and is an injury to him. Herein the case of a ferry differs from setting up a trade, or school, near another; the tradesman or school-master is not bound to keep it up. 3 Black. Com. 219. His right of action is not confined to one who erects a ferry; it is extended, upon the same principle, to any one who, *for pay*, transports a person, or his effects, across the water between the same points, or so near as to draw off his custom. The same principle extends to any one who thus transports *without pay*; for the gist of the action is the drawing off his custom, and thereby subtracting from profits to which he is entitled. The injury to him is the same, whether the wrongful act be done for pay, or without pay. *Blesset* v. *Hart*, Willes' Rep. 508; *Tripp* v. *Frank*, 4 Term Rep. 666. The important question, that upon which our case turns, is discussed in the latter case. The opinion is expressed that the persons must be those who wish to go along the road of which the ferry makes a part, so that the act of the defendant in transporting them a little above or below the ferry, is a *fraud* in evasion of the plaintiff's rights, and it is decided that the action would not lie on that case, "because the persons transported were substantially, and not colorably, carried over to a different place." The plaintiff's ferry was from Kingston to *Barton;* the defendant carried the persons from Kingston to *Barrow*, two miles to the east of the former place. The persons did not wish to go to Barton, and the plaintiff was not bound to carry them to Barrow. The Court say "his right is commensurate with his duty;" as he was not bound to carry them to Barrow, he can not complain of the defendant for doing so. It would be unreasonable to require them to submit to the inconvenience of being carried first to Barton, and thence making their way to Barrow. So, the plaintiff's *customers* are really those who wish to go from Kingston to Barton.

In the assertion of this right, many difficulties were presented: What distance was so near to a ferry as to draw off its custom? Who were customers? What damages was the plaintiff entitled to?—the toll which the plaintiff would otherwise have received?—or such toll, *minus* the cost of transportation? Were these matters to depend on the leaning and feeling of each particular jury? To remove these difficulties, the Act of 1764 (Rev. Code, ch. 101, sec. 30,) provides, that if any person shall, without authority, keep a ferry, or transport, *for pay*, any person, or his effects, across a river or water, within ten miles of a public ferry, he shall pay a penalty of two dollars for each offence, to be recovered by the nearest ferryman, &c. This statute recognises the common law right against a person who erects a ferry without authority, or transports a person, or his effects, for pay. The remedy is cumulative; it fixes the distance at ten miles; the damages at two dollars; and extends the statute remedy to all persons transporting *for pay*, *without reference to their being customers.*

It was thought by some that the statute, by inference, denied the common law right against a person who transported any person without pay. The point was made by the case of *Long* v. *Beard*, 3 Murph. Rep. 57. It is there held that the statute is cumulative in regard to the remedy, and left the common law rights of ferrymen untouched; and it was decided that the plaintiff had a right of action against the defendant for erecting a *free ferry* within one mile of his ferry, and opening a road on both sides of the river leading to, and from the road of which his ferry made a part, to wit, from Salisbury on one side, to Thompson's tavern on the other, and thence to Salem and Danville, whereby the plaintiff's custom was drawn off, and his profits diminished, by inducing horsemen, and other travellers, and wagons, and other carriages, passing and repassing from Salisbury to Thompson's tavern, to go by the free ferry. The decision is put upon the ground that all horsemen, and other travellers, wagons, &c., passing and repassing between the *termini* of the road, are customers; so that,

if such customers are drawn off, the distance of the new ferry from the old one is not material, and it only becomes so in reference to the question, is it so near as to draw off custom to which the old ferry is entitled?

The principle of that case extends to one who transports a person, or his effects, *without pay*, provided custom to which the plaintiff is entitled is substracted; but such facts must be alleged and proven, as show that the person transported was one who would, otherwise, have passed over the road of which the plaintiff's ferry makes a part; in other words, that the *termini* of the plaintiff's ferry were between the points of such person's departure and destination—were in his route, and would have been passed by him, but for the defendant's wrongful interference. HALL, J., calls attention to the fact, that every man who crosses a river at a point near a ferry, is not a customer of the ferry, "otherwise no person could set his neighbor across in a private boat."

When it is recollected that the statute forbids the transportation of persons who are not customers, as well as those who are, it is easily seen why it is restricted to a transporting *for pay*. Had it extended to a transportation without pay of persons other than customers, it would have worked a grievous evil by interrupting neighborhood intercourse, and it was supposed that cases of gratuitous transportation of customers would rarely occur, and if it did, the common law remedy would correct it.

Our case then, is narrowed to this—were the persons who were transported by the defendant, from Wilmington to the depot on the island, customers of the plaintiff's ferry? The *termini* of his ferry must be fixed by reference to the charters, and the purpose for which they were granted.

Eagle's island lies between Wilmington and the old town of Brunswick. It is some mile and a half in extent—low and marshy—fit for rice fields, and not passable by carriages, or horses. The purpose of granting the charter to *Dry*, in 1764, and continuing it to *Smith*, who had succeeded to his rights, in 1784, as is set out in the two acts or charters, was to get a

road made across the island, so as to effect a communication between the towns of Wilmington and Brunswick. The road and the two ferries make one public highway from the one town to the other; the obligation to repair the road is the same as to keep up the ferries; but it was expedient to subdivide the toll, and allow it to be taken for passing either ferry; in the same way as toll gates are erected at convenient distances on a plank road, or turnpike, because persons might wish to cross the river at Wilmington, go over the road to the river opposite to Brunswick, and then go up the river without crossing it, or to cross from Brunswick, go over the road to the landing opposite Wilmington, and then go up the river, or leave their horses and vehicles at the landing, and cross over to Wilmington as *foot* passengers; and a penalty of twenty shillings is imposed for transporting, *for pay*, any person, &c., over either of the branches of the Cape Fear river, *in order to his passing through the island.* If we consider each ferry as a separate establishment, each still retains its connection with, and reference to, the road, and the *termini* of the ferry under consideration, are the town of Wilmington and "a point opposite Market street," *where the road leads off.* This is the plaintiff's landing—the place to which he is bound to carry persons, &c., and his customers are all persons who wish to cross from Wilmington to that place; these he is bound to serve; but suppose a person wishes to go to a steam saw-mill on the island, half a mile from this point; the plaintiff is not bound to carry him there; "his rights are commensurate with his duties," therefore, this person is not one of his customers. It would be ill service to take him to the landing place of the plaintiff, and leave him to get to the mill through the marsh, or hire a boat to take him up!

The defendants' depot is on the island, some little distance from the road, and "the landing place" of the plaintiff. The persons transported by the defendants from Wilmington to the island, did not wish to cross over the island, or to use the road, or to go to the plaintiff's landing; they wished to go to the defendants' depot; but for it, they had no business, or de-

sire to go to the island, and their going was without reference to the plaintiff's ferry, or the road; so they were not his customers.

It is unnecessary to consider the fact that, for fifty years—ever since the island has been used for rice-fields, or other purposes—every person has been crossing over the river from Wilmington to the place on the island where his business called him, without objection on the part of the plaintiff, or those under whom he claims: we have seen they have a perfect right to do so; they were not his customers. So the learning about "prescription" and "dedication" has no bearing. It is also unnecessary to consider the effect of the exception in the deed of the defendants. For, as the plaintiff has no cause of action without reference to the exception, that cannot give him one.

PER CURIAM. Judgment affirmed.

Doe on dem of ARNOLD WATKINS *v. The heirs of* CELIA EASLEY.

The heirs-at-law of a deceased defendant cannot, against the will of the plaintiff's lessor, make themselves a party to an action of ejectment, so as to prevent the suit from abating.

At the Spring Term, 1857, of Stanly Superior Court, a motion was made before PERSON, Judge, by the heirs-at-law of Celia Easley, whose death had been suggested upon the record, to be permitted to make themselves parties defendant in lieu of their deceased mother, and a proper bond for that purpose was filed by them in the office of the Court.

The motion was opposed by the lessor of the plaintiff, and refused by the Court, from which judgment the said persons, the heirs of Celia Easley, appealed to this Court.

No counsel appeared for the plaintiff in this Court.
Bryan, for defendants.

BATTLE, J. The question presented in this case depends upon the proper construction of the 5th section of the 1st chapter of the Revised Code. This enactment was originally made in 1799, and was intended to prevent the abatement of an action of ejectment by the death of the defendant therein. The mischief at common law was, that upon the death of the defendant, the suit abated, in consequence of which the plaintiff's lessor had to pay his own costs, and commence a new suit against the heirs, or devisees. To prevent this, the Act authorised the lessor to revive the suit by serving on the heirs-at-law, or devisees, of the deceased defendant, or the guardian, within two terms after the death of the defendant, "a copy of the declaration filed in the said action," &c. This was intended for the benefit of the lessor, and though we have no doubt he might permit the heirs, or devisees to come in voluntarily, and be made parties, yet we cannot discover anything, either in the policy, or terms of the Act, which gives them the right to come in, and be made parties against his will. He may prefer to suffer the action to abate, in order to avoid the risk of having all the costs to pay in the event of a decision against him. If he choose to abandon his suit upon an abatement, because he may thereby avoid the payment of other costs than his own, we do not see that the Act in question gives to the heirs, or devisees, of the deceased defendant, any right to prevent it.

We have examined the cases referred to by the defendant's counsel, and we cannot find anything in opposition to these views.

PER CURIAM. Judgment affirmed.

PETERS P. SPENCER, *administrator*, *v.* DAVID CARTER.

The notice given to a guarantor that he is looked to for the debt guarantied, must be positive and unconditional.

Action of Assumpsit, tried before his Honor, Judge Bailey, at the Spring Term, 1857, of Hyde Superior Court.

This was an action brought against the defendant, as the guarantor of a note made payable to him by one Jesse E. Williams, which was passed by him to the plaintiff's intestate, and guarantied to the said intestate. The defense, among other things, was that the defendant had no such notice of the default of Williams, as would make him liable. On this point, the plaintiff introduced *Mr. Beckwith*, who testified that Jesse E. Williams died intestate, about the 20th of February, 1853; that he was the attorney of the plaintiff's intestate, and was employed by him to collect the note from Williams; that plaintiff's intestate died in August, 1853, and he was also the legal adviser of the plaintiff, as administrator; that, at the Spring Term, 1853, of the Court of Equity of Hyde County, a bill was filed by one Chapman, claiming to be a copartner in trade with the said Williams; that, in November, 1853, while this suit in Equity was pending, in a conversation with defendant in relation to it, witness told the defendant that, if Chapman prevailed in that suit, the assets in the hands of Williams' administrator would be exhausted, and that he, the defendant, would be looked to on his contract of guaranty; but in the event that Williams' administrator prevailed, that estate would be sufficient to pay the note, and he would not be looked to.

His Honor being of opinion with the defendant on the question of notice, nonsuited the plaintiff, who appealed to this Court.

No counsel appeared for plaintiff in this Court.
Donnell, for defendant.

Nash, C. J. The defense is put upon two grounds. The first is that no notice was given by the plaintiff to the defendant of the failure of his principle to pay the debt which he had guarantied. The second, that the delay in the demand had discharged his liability. It is unnecessary to consider

the second ground of defense, as our opinion is put upon the first.

A guaranty is a promise to answer the payment of some debt, or the performance of some duty by another, who is himself first liable. To fix the guarantor, and to entitle the plaintiff to sustain his action, he must make a demand upon the principal, and upon his refusal or neglect, give the defendant notice, within reasonable time, of the fact, and that he is held liable. Notice is, in law, a part of the agreement, and before it is given, the debt does not arise. It must be averred in the declaration and proved. Parsons on Contracts, 514; *Grice* v. *Ricks*, 3 Dev. 62.

As to the notice here, what is the evidence? *Mr. Beckwith*, the legal adviser of the plaintiff, told the defendant that a bill in Equity had been brought by one Chapman against the administrator of Williams, claiming to have been a partner with him, and that if Chapman obtained a decree in his favor, the assets in the plaintiff's hands would be exhausted, and he, the defendant, would be looked to upon his guaranty; but in the event that Williams' administrator prevailed in the suit, then the note would be paid by the administrator. This certainly was not notice, in contemplation of law, to the defendant that he was looked to. On the contrary, he is told that, if the suit by Chapman went in favor of the estate of Williams, there would be assets to pay the debt, and if it went against Williams, there would not be; and in that event *he would be looked to.* This was during the pendency of the suit in Equity, and no notice, as far as the case discloses the fact, was ever given to the defendant, of its issue. The notice to which the guarantor is entitled, to sustain an action against him on the guaranty, must be positive that he is looked to, and held liable on his guaranty. His Honor was of opinion that there was no legal notice proved. In this there was no error.

Per Curiam. Judgment affirmed.

STATE *v.* J. B. STANLY, *et al.*

Where a party has been tried in the County Court upon an indictment for an affray, he cannot be again tried for the same act in the Superior Court upon a bill for assault and battery.

THIS was an indictment for ASSAULT and BATTERY, tried before His Honor, Judge PERSON, at the Spring Term, 1857, of Columbus Superior Court.

The defendant pleaded not guilty, and former conviction.

Francis M. Buie swore that he met with the defendants in Whitesville, (eleven in number) and went with them about two miles up the public road leading towards Bladen County; that they there blindfolded, stripped, and whipped him severely with switches, cutting the skin, and causing the blood to flow freely.

Mr. Smith swore that he saw Buie next day, and that his back was badly lacerated, and the splinters from the switches were then sticking in the flesh.

The defendant offered in evidence the transcript of a record of the County Court of Columbus, which showed that the defendants had been indicted in that Court, and convicted for an affray. The bill in that Court charged that the defendants, with Marion Buie, "being unlawfully assembled together, and arrayed in a war-like manner, then and there in a certain public place and highway there situate, unlawfully, and to the great terror and disturbance of divers citizens, then and there being, did make an affray against the peace, &c."

The grand jury found a true bill as to all but Buie. The defendants pleaded guilty to the bill of indictment.

In the County Court there was no evidence before the Court when they pronounced the judgment. The chairman stated that the defendants had submitted for violating the law, and fined them five dollars each.

The county attorney swore that the indictment was founded on the same transaction for which the defendants were here

indicted, but that no witnesses were examined before the County Court.

The Court charged the jury "that to sustain the plea of former conviction, the evidence in the Superior Court must be such as would have been sufficient to convict the defendant upon the indictment in the County Court. They were indicted here for an assault and battery upon Buie; in the County Court the indictment was for an affray by them and Buie, but omitted to charge that they assaulted and beat each other, and that the evidence now before this Court would not have been sufficient to convict the defendants upon that indictment, and, therefore, that they had failed to make good their plea of former conviction." Defendants excepted to the charge.

Verdict and judgment for the State, and appeal by the defendants.

Attorney General, for State.
E. G. Haywood, for defendants.

Battle, J. The plea of *autrefois convict*, like that of *autrefois acquit*, is founded upon the principle, that no man shall be placed in peril of legal penalties more than once, upon the same accusation; 1 Chit. Crim. Law, 452, 462. To entitle the defendant to either of these pleas, it is necessary that the offence charged be the same, and that the former indictment, as well as the conviction, or acquittal, be sufficient. In the case of a former acquittal, the test of identity is, that the testimony given upon the latter indictment would have supported the first indictment. The rules in relation to a former conviction are generally the same; but, as has been well contended by the counsel for the defendants, there must necessarily be an exception in favor of the plea of *autrefois convict*, in order to sustain the principle upon which both pleas are founded. Thus it has been settled, that if one be indicted for burglary in breaking a dwelling house, and *stealing goods therefrom*, and be acquitted of the charge, he cannot plead

such acquittal in bar of an indictment for burglary in breaking the dwelling house with *intent to steal;* 1 Russ. on Crim., page 830, (of the 6th Am. Ed.) The reason is, that proof under the latter indictment of the *breaking with intent to steal*, would not have supported the charge in the former, of breaking and *actual stealing*. But if the defendant had been convicted upon the first indictment and pardoned, we presume he hardly would have been convicted a second time upon another indictment for a breaking with intent to steal. The latter is included in the former, and to permit such a conviction would be placing the accused "in peril of legal penalties more than once upon the same accusation." This principle is directly applicable to the present case. The first indictment (which was in a Court having concurrent jurisdiction of the subject with the Superior Court) was for an affray. This charge necessarily included that of the assault and battery, for which the second indictment was found. "An affray (say the Court in the *State* v. *Allen*, 4 Hawks Rep. 356) is the fighting of two or more persons in a public place, to the terror of the citizens. The very definition, therefore, includes an assault and battery, and if it were proved to the jury that two men fought together, in a private place, and under such circumstances as that it could not be a terror to the people, we think there is no doubt that they might be acquitted of the affray, and convicted of the assault and battery." See also *State* v. *Woody*, 2 Jones' Rep. 335; Arch. Crim. Pl. 451; 1 Hawk. Pl. Cr. ch. 63, sec. 1. Now it is manifest, that if the parties can be convicted and punished for the affray, and afterwards be indicted, convicted and punished for the assault and battery, they will be twice punished for the same offence. If they had been acquitted of the charge for an affray, upon the ground that the fighting was in private, no notice being taken in the verdict of the assault and battery, we can at once see that there would be no injustice in permitting them to be indicted and punished for the offence of mutually assaulting and beating each other. But we do not decide whether the plea of *autrefois acquit* would be a good bar in such a case,

as it seems that an acquittal for murder may be pleaded in bar of an indictment for manslaughter; 1 Chit. Crim. Law, 455. We are clearly of opinion, however, for the reasons above stated, that *autrefois convict* is a good plea in bar of the indictment for the assault and battery. In making this decision we are upholding a great conservative principle in favor of the liberty of the citizen, though, in the instance before us, its application will save from adequate punishment a gross and outrageous violation of the law. In the County Court there were no witnesses examined to show the aggravated circumstances of the offence, and the chairman, after stating simply that "the defendants had submitted for violating the law," pronounced the judgment of the Court that, they be fined five dollars each; while in the Superior Court, when all the facts were proved, the presiding Judge deemed it a fit case for the imposition of a fine of fifty dollars each, upon a majority of the offenders, and twenty dollars each upon the others. There must be a *venire de novo*.

Per Curiam. Judgment reversed.

WHITE & JOYNER *to the use of* WILLIS JOYNER *v.* S. B. POOL.

A cabinet-maker agreed with a merchant to make an article of furniture and deliver it to the latter in payment of a debt which he owed the merchant. After the article was begun, the mechanic went into co-partnership with another, and the two finished and delivered it. *Held*, that this new firm had no right to make a new charge and recover for the price of the property, but that it was subject to the terms of the original special contract.

Assumpsit, tried before Ellis, J., at the Spring Term, 1857, of Hertford Superior Court.

The plaintiffs proved on the trial that they were co-partners in the business of cabinet-making, and jointly owned all the stock in trade, including the bureau in question, which they

had made. That this bureau was delivered to the defendant, and was worth thirty-six dollars. The action was brought for the price of the piece of furniture.

The defendant proposed to prove, as a defence to the action, that before the formation of the co-partnership above mentioned, the plaintiff White was indebted to the firm of S. B. Pool & Co., in a sum greater than the value of the bureau above stated, that the defendant Pool was the active and managing partner of the firm, and that he contracted with White, still before his partnership with Joyner, that the said White should make and deliver to him a bureau, at the price of thirty dollars, which was to be taken in discharge, *pro tanto*, of the debt which he owed Pool & Co.: that White commenced making the article contracted for, but before he finished it Joyner became his partner, and it was completed by them jointly, and delivered to the defendant as above stated. This evidence was objected to by the plaintiffs and rejected by the Court. Defendant excepted.

Verdict and judgment for plaintiffs, and appeal by the defendant.

B. F. Moore, for plaintiffs.
Winston, Jr., for defendant.

Battle, J. The testimony offered by the defendant was, we think, admissible under the general issue, *non assumpsit*, to prove that he had never promised in manner and form as set forth in the plaintiffs' declaration. Its purpose was to show that the defendant had made a special contract for the bureau with one, only, of the plaintiffs; and surely he had no right to vary that contract without the consent of the defendant; especially when such variance was to have the effect of defeating the main object which he had in view in making it. If the defendant had paid for the article of furniture at the time when he ordered it from the plaintiff White, the injustice of permitting the latter to compel a second payment by taking in a partner, would have been obvious, and yet there

is no difference in principle between that case and the present. Here White owed the defendant, and it was to secure the debt that he agreed to take the bureau. That purpose the law will not permit to be defeated by the debtor's taking into partnership another person with whom the defendant had never had any communication.

The case of *Norment* v. *Johnston*, 10 Ire. Rep. 89, which is the only authority referred to and relied upon by the counsel for the plaintiffs, does not, in our estimation, aid their case. The principle therein decided was, that one partner could not, by a contract with another person, charge what was shown to be his individual debt to that person, upon the firm, without the consent of the other members of the firm. Surely that does not prove that an individual party to a contract can convert that contract into one with a firm, without the consent, and to the prejudice, of the other party.

Our conclusion is, that the testimony proposed, if true, was a complete defence against the action, and consequently, the Court erred in rejecting it. There must be a *venire de novo*.

PER CURIAM. Judgment reversed.

HENRY BARTLETT *v.* EDMUND SIMMONS.

The acts of going yearly, for a few weeks at a time, to get rails and other timber off of land, though only valuable for timber, do not amount to such an exercise of ownership as will ripen a defective title, or give an action of trespass *quare clausum fregit*.

THIS was an action of tresspass *quare clausum fregit*, tried before ELLIS, J., at the Spring Term, 1857, of Camden Superior Court.

The plaintiff traced his title from one James Bray, who was in the habit, more than forty years ago, of going yearly, for a few weeks at a time, upon the land, and getting rails

and other timber; that in some years he would go more than once; that he also would go upon the land as often as they were cut, and take off timber and rails. This was continued until the year 1828, when he sold by metes and bounds to Ziba Forbes, who continued the same practice of going yearly and getting timber as above stated, until 1834, when he sold to one William Bartlett, by metes and bounds, who continued the same acts as above stated, until his death, in 1852. The plaintiff is his son and heir-at-law.

The land in question is swamp, and not susceptible of cultivation. It is only valuable for the purposes of getting timber. It is disconnected with any other lands owned by the above named persons.

There was no other evidence of title in the plaintiff.

The Court was of opinion that, upon this state of facts, the plaintiff was not entitled to recover.

The plaintiff submitted to a nonsuit and appealed.

Jordan, for plaintiff.

No counsel appeared in this Court for the defendant.

Pearson, J. The acts of the plaintiff, and those under whom he claims, in getting rails off of the land from year to year, were separate and unconnected trespasses, and do not amount to the exercise of such ownership as will ripen a title, or give the right to maintain an action of trespass, q. c. f. The doctrine on this subject is discussed, and all the cases collated in *Loftin* v. *Cobb*, 1 Jones' Rep. 406. There is no error.

Per Curiam. Judgment affirmed.

CHARLES MALLOY, *et al. propounders v.* MATTHEW McNAIR, *et al., caveators.*

A provision in a will that a certain female slave "will be set free, if she behaves herself as a good character should do—to be under the care of my daughter J. and her daughters," conveys no interest, either legal or equitable, to the daughters of J.

Where a script was attested by three witnesses, one of whom was incompetent on account of a pecuniary legacy, and afterwards a legacy was transferred from one legatee to another, by erasing the bequest in one part of the instrument and interlining it in another, as to which acts one of the competent witnesses to the first execution, and the one taking the legacy, again attested it, the alteration in no wise affecting his legacy, *held*, that the script, in its altered condition, was duly attested.

THIS was an issue *devisavit vel non*, tried before PERSON, J., at the Spring Term, 1857, of Richmond Superior Court.

The script propounded as the last will of Niel McNair, is (materially) as follows:

"1st. I give to my daughter Miriam Smith, a tract of land on which she and her children now live, called the fork tract, &c., (with certain contingent limitations of the same.) I also give and bequeath to my said daughter, *a servant by the name of Nancy and her three children*, to her, and to the heirs of her body for ever.

"2nd. I give and bequeath to my daughter Sarah Gibson, a boy named Philip, (with limitations over.)

"3rd. I give to the children of my daughter Anne Eliza Chance, dec'd., a servant named Lizzy, and a boy named Henry.

4th. I give and bequeath to my grandson, Niel A. McNair, one hundred dollars, as he needs it.

5th. I give and bequeath to my son, John C. McNair, five hundred dollars, to be given him by my daughter Jane McNair, out of any monies on hand, or due to me at my death.

6th. I give and bequeath to my son Matthew McNair, a servant named Peggy, and her offspring. The other proper-

ty I gave my son Matthew W. was conveyed by me to him, by deed and bill of sale.

7th. I give and bequeath to my daughter Catharine McNair, a servant named Emily, &c.

8th. I give and bequeath to my daughter Jane McNair, all my lands on both sides of gum swamp, including the mansion house and premises on which I now live, * * * * together with the following servants, to wit: "*Nancy and her offspring*," Suckey, Jim, Statira and offspring, Charles, Caroline, Eliza and her son Milton; Eliza's other child, Minerva, will be set free, if she behaves herself as a person of good character should do, to be under the care of my daughter Jane and her daughters, to be taught to read the new testament. Also I give to my daughter Jane, Celia and her offspring, Charles, a blacksmith. I also give and bequeath to my said daughter Jane, the land I own on Bridge creek. * Also my negro woman Hannah, to remain with my said daughter. Also I give and bequeath to my daughter Jane, all my blacksmith tools, farming implements, wagon and gear, two carriages and harness, all my horses of every description, all my cattle, hogs, poultry; all my household and kitchen furniture, cotton-gin, press, and all my other property of which I may die seized and possessed, not otherwise specially devised." Dated 1st of December, 1855. Signed by the testator, and witnessed as follows: "Signed, sealed, pronounced and declared, by the testator, Niel McNair, as his last will and testament, in the presence of us, who, in the presence of the said testator, have subscribed as witnesses. Test, D. McLaurin; Test, Miriam A. McNair; Test, Niel A. McNair; Test, Miriam A. McNair." Testator died 7th of January, 1856.

Duncan McLaurin was the writer of the will, and proved its execution according to the forms of law, also its subsequent erasure and interlineation, as stated below.

Miriam a McNair, another subscribing witness, was offered, and objected to by the caveators; because, that by a clause in the 8th item of the will, Minerva is bequeathed to Mrs. Jane McNair and her daughters, of whom the witness was one.

The witness was admitted by the Court, and proved the due execution of the will as drawn by McLaurin; and she and McLaurin both proved it as originally executed. Miriam McNair proved that the words in *italics* in the 1st item of the will in relation to Nancy and her children, were erased by the testator with his own hand, and the words also stated in the 8th item in italics, in relation to Nancy and her offspring were interlined by the testator; she stated that she had witnessed the will twice, the last time with Niel McNair, upon the occasion of the erasures and interlineations as above set out; that this was done at the request of the testatator, a few days after the original execution of the will. The will, as originally witten, was still legible, notwithstanding the erasure. Niel A. McNair is the person mentioned in the 4th item of the will, and was objected to on account of interest, being a legatee under that item; and the objection was sustained.

The Court instructed the jury that, taking the evidence to be true, the marking or erasures could not affect the other parts of the will, inasmuch as it was done only to alter the disposition of Nancy and her children, which he attempted by the interlineation, but which failed for the want of proper attestation; that they should find the script as first written and attested, to be the last will and testament of Niel McNair, because the revocation, as to Nancy and child, was only upon the condition that the interlineation should take effect. The caveators excepted.

Verdict in favor of the propounders. Judgment and appeal.

Winston, *Sen'r.*, for the propounders.
Kelly and *Cameron*, for the caveators.

Pearson, J. Miriam McNair does not take either a legal or an equitable interest in the girl Minerva, consequently she was a competent witness.

The will directs Minerva "to be set free." This is incon-

sistent with the idea that any one was to have an ownership, or interest in her, as property. The intention was simply to recommend her, after she was set free, to the care and patronage, and friendly offices, of the testator's daughter Jane, and her daughters; which was the more proper, as he had given the mother and brother of Minerva to his daughter, and, no doubt, expected she would allow Minerva to continue to live with the family.

In *Simpson* v. *King*, 11 Ire. Rep. 377, the intention was to vest the legal title in some one, as the ostensible owner of the slave, who was to be in law his master, but was to allow him certain privileges, and was not to treat him as a bond slave. In our case, the intention was to set the girl free. So, no one was to be her master, either really or ostensibly. This distinguishes it from *Simpson* v. *King*, and from *Lea* v. *Brown*, 3 Jones' Eq. 140.

The script was, therefore, duly executed, and ought to have been admitted to probate, either in its original, or in its altered condition. In this question Niel A. McNair had no interest, for it would in no wise affect the legacy of one hundred dollars, given to him, whether Nancy and her children passed under the first item, or under the 8th. So, there is error in holding that he was not a competent witness in reference to the cancellation and interlineation of that part of the script. He was competent, and the attestation of Miriam A. McNair and this witness, ought to have been allowed the effect of establishing the script as a will in its altered condition.

Suppose the original script had been left unaltered, and a codicil added, changing the legacy in respect to Nancy and her children, by giving them to Jane McNair instead of Miriam Smith, and the codicil duly attested by these two witnesses, could it be seriously insisted that Niel A. McNair was not a competent witness, because he had a legacy given him in the will? Instead of making a codicil, the testator resorted to the shorter mode of cancelling and interlining, and took the precaution to have two attesting witnesses to the script

in its altered condition. This had, in law, precisely the same effect as a codicil, and, of course, the principle is the same in regard to the competency of the subscribing witnesses.

It is unnecessary to decide the point as to the effect of the statute, which went into operation after the will was executed, but before the death of the testator. Nor is it necessary to notice the exceptions taken to the charge. There must be a *venire de novo.*

PER CURIAM. Judgment reversed.

RICHARD FELTON *v.* JOSIAH R. WHITE.

Where, in a question whether a certain deed was fraudulent and void as to creditors, facts were adduced and relied on by both parties, and many of the usual badges of fraud were proved; among other facts, it appeared that a small balance, out of a large consideration recited in the deed, was unpaid, it was error in the Court to make the question of fraud turn upon the payment. or the non-payment, of the *whole* consideration expressed in the deed.

ACTION of TROVER, for the conversion of John, a slave, tried before ELLIS, J., at the Spring Term, 1857, of Perquimons Superior Court.

The slave in question, with fifteen others, was given by the will of one Kedar Felton to one Townsend, for his life, and after his death without children, to the plaintiff and his brother Elisha Felton.

The plaintiff introduced a bill of sale for all the negroes, from Townsend to him, reciting the consideration of two thousand dollars, dated October, 1855, and witnessed by one Elisha Felton, the brother of the vendee. Both he and the vendee were the uncles of the vendor Townsend. At the time of the alleged sale, Townsend was much in debt, and only had personal property, beside these negroes, to the amount of three hundred dollars, which was subsequently sold under

execution. He had also a tract of land, which brought in a rent of twenty-five dollars. After the execution of the bill of sale, the slaves went into the possession of the plaintiff for a short time, and then went back to the possession of Townsend. The latter lived upon a plantation which he had formerly owned, but which he had sold to his father-in-law. For the then current year, however, this plantation had been rented by the plaintiff. The negroes mentioned in the bill of sale remained with Townsend upon this plantation, until they were seized by the defendant, as sheriff, under executions, except that on one occasion they were sent to the plaintiff at Hertford for the purpose of being hired out, and, after a day or two, returned into his possession.

No money was paid at the execution of the bill of sale, but both the subscribing witnesses and the vendor Townsend, swore that it was agreed that the price of $2,000 was to be paid by the vendee's taking up claims against Townsend to the amount of $2,000. The plaintiff did take up claims against Townsend to the amount of $1,920, and gave his note for the remaining $80 to Townsend, which was still unpaid. Some of these debts were executions levied on the property conveyed, and all of them were *bona fide*.

Townsend swore that, after the sale, the slaves remained with him, as the property of the plaintiff, he acting merely as his agent; that he received no wages, nor contracted for any; that he made no return of sales, nor of negro hires, and that there was no understanding between him and the plaintiff, that he should do so. He said that nothing was made on the farm for sale, but that all it produced was consumed by the family and negroes; that he had the entire control of the slaves and other property, and had not received any instructions from the plaintiff in regard to it; that the latter had not been upon the premises since the date of the bill of sale. He swore that there was no arrangement or understanding, at any time, that he, Townsend, was to have a beneficial interest in the property, and that he had no design of delaying or defrauding his creditors.

It appeared that two thousand dollars was a fair price for Townsend's life-estate in the slaves.

The Court instructed the jury that he who alleged fraud must prove it. That the defendant in this case did allege fraud, and to entitle himself to a verdict, he must prove the fraud as alleged. That inasmuch, however, as Townsend was admitted to be largely indebted beyond his ability to pay, and all these facts were known to the plaintiff and Townsend at the time of the execution of the bill of sale; and as the transaction was between near relations, (the plaintiff and the subscribing witness being the uncles of the bargainor,) it must appear that the $2,000 recited as the purchase-money was a fair price for the slaves, and that it was actually paid by the plaintiff, otherwise the transaction would not be supported, but would be fraudulent as to creditors. It was left as a burthen upon the defendant to satisfy the jury that a fair price had not been given for the slaves if such were the fact, but it was imposed upon the plaintiff as a burthen in view of the facts recited to prove that he had actually paid the purchase-money for the slaves, and failing to do so, the defendant would be entitled to a verdict. Plaintiff excepted to this charge. Verdict for the defendant. Judgment and appeal.

Heath, for the plaintiff.

No counsel appeared in this Court for the defendant.

Nash, C. J. The plaintiff excepts only to that portion of his Honor's charge which relates to the payment made by the plaintiff to the witness, Townsend. The latter had a life-estate in certain slaves, among whom was the negro Tom, the subject of this suit, and all of whom he sold to the plaintiff, as is alleged, at the price of $2,000, which was their value. The transaction had many of the usual badges of fraud, but was averred by the plaintiff to have been fair and *bona fide*. Townsend was examined as a witness, and stated that though no money was paid to him, yet the price agreed on between him and the plaintiff was to be paid by the latter, in discharg-

ing debts of his to that amount, and the plaintiff did discharge debts honestly due by Townsend to that amount, except about eighty dollars, for which he gave Townsend his note. The defendant justified taking the slave in question, under an execution against Townsend, alleging the sale to the plaintiff by him to have been fraudulent, and void as to creditors, he being, at the time, greatly indebted."

His Honor instructed the jury, in substance, that as the defendant alleged that the sale to the plaintiff was fraudulent, he must prove it, and after setting forth the apparent badges of fraud attending the transaction, he proceeds as follows: "It must appear that the two thousand dollars was a fair price for the slaves, and that it was *actually paid* by the plaintiff, otherwise the action could not be supported, but would be fraudulent as to creditors," and closes his charge by instructing the jury "that it was imposed as a burthen upon the plaintiff, in view of the facts recited, to prove that he had *actually* paid the purchase-money for the slaves, and failing to do so, the defendant would be entitled to a verdict.

It is very certain the alleged sale of the slaves by Townsend had many, if not all, the usual badges of fraud. Fraudulent, however, as it apparently was, it was open to the plaintiff to show, if he could, that the transaction was a fair and *bona fide* one. He was at liberty to show that the price agreed on was the full value of the slaves, and that he had paid that price. Townsend, whose testimony was received without objection, swore that the price of the slaves was to be discharged by paying debts due by him, and it was proved that the plaintiff had paid debts of Townsend to the amount of $1,920, leaving unpaid the small sum of $80, for which he gave Townsend his note. It was proved that the interest of Townsend in the slaves, at the time of the conveyance, was worth $2,000. His Honor committed no error in charging the jury that it was incumbent on the plaintiff to show that he had paid the purchase-money; but we think he erred in charging them that from it they might rightfully infer that if any part of the price, however small, was unpaid, the price had not been ac-

tually paid. Such must have been the impression produced on the minds of the jury; for there is no suggestion that the plaintiff had not paid to the creditors of Townsend $1,920 out of the $2,000; nor was there any question made that the claims so paid by him were not fairly and honestly due from Townsend, His Honor ought to have instructed the jury as to the $80, that the deficit in the non-payment of so small a part of so large a sum, ought not to deprive the plaintiff of the benefit resulting from the payment actually made by him, if they were satisfied of the *bona fides*. Believing that this point was not placed before the jury in its proper light, and that injustice may have resulted to the plaintiff from the error, we think he is entitled to have his case examined by another jury. *Venire de novo.*

Per Curiam. Judgment reversed.

STATE *v.* TRIM HOPKINS.

Where a slave handed money to a free negro in a liquor shop, who handed it to the liquor dealer, and on receiving for it a quantity of spirits, which, then and there, was handed by him to the slave, it was *Held* that he was not guilty of either *selling* or *giving* the spirits to the slave.

This was an indictment against the defendant, who was a free negro, for furnishing liquor to a slave; tried before his Honor, Judge Ellis, at the Spring Term, 1857, of Perquimons Superior Court.

The indictment contained two counts; one for *selling* spirituous liquor to a slave; and the other for *giving* it to him. Both counts concluded against the act.

The proof was that, after January, 1856, when the Revised Code went into operation, the defendant, who is a free negro, being in company with Jack, a slave, belonging to a Mr. Skinner, at a house where spirituous liquor was usually sold,

received from the said slave a small piece of money, with a request that, with it, he would purchase for him a quart of spiritous liquor, which he did, and immediately delivered it to the slave.

The defendant contended these facts did not constitute a breach of the statute; but the Court being of a different opinion, so instructed the jury. Defendant excepted.

Verdict for the State. Judgment and appeal.

Attorney General, for the State.

Jordan, for defendant.

Nash, C. J. The defendant, a free man of color, is indicted for a violation of the laws of the State punishing the trading with slaves. The indictment contains two counts: one for *selling* spiritous liquor to a slave, the other for *giving* the liquor to the slave. The Revised Code contains two chapters on this subject: the 34th and the 107th. The 87th section of the first provides—"No person shall sell or deliver to any slave, for cash, or in exchange for articles delivered, or upon any consideration whatever, or as a gift, any spiritous liquor," &c. The 67th section of the latter chapter is as follows: "If any free negro shall, directly or indirectly, sell, or give to any person, bond or free, any spiritous liquor, he shall be guilty of a misdemeanor." These two chapters, being passed at the same session of the Legislature, constitute but one Act, and are to be considered together. The language used in the 34th chapter is sufficiently broad to embrace free negroes, but it did not go as far as the Legislature thought the existing evil required. It forbade that class of our population from trading with slaves for any of the articles enumerated in it, but it did not reach another practice which was felt as a great nuisance, their dealing in spirituous liquor with white men. To cure this defect, the 67th section of the 107th chapter was inserted, forbidding them to sell, or give to *any one* any spirituous liquor. The question presented to us is, do the facts

stated in evidence bring the defendant within either clause of the recited chapters? We think they do not.

They are as follows: The slave named in the indictment gave the defendant money, requesting him to purchase spirits for him. They went together, or were, at the time, both present in the place where liquor was sold. The defendant then handed the seller the money of the slave, and received a quart of spirits, which was handed to him by the vendor, and by him immediately handed to the slave. In contemplation of law, did the defendant sell to the slave the spirits, as charged in the first count of the indictment? A sale, as defined by Justice Blackstone, "is a transmutation of property from one man to another in consideration of some price or recompense in value; for there is no sale without a recompense; there must be a *quid pro quo*;" 2 Black. Com. 446. The defendant had no property in the article sold, and received from the slave no consideration of any kind. There was then no sale by the defendant to the slave.

Was there any gift, as charged in the second count? Both the slave and the defendant were present during the whole transaction. When the defendant had received the money from the slave, he handed it to the vendor, who, in return, handed the spirits to him, and he immediately transferred it to the slave. The parties were both present. The spirits were in the possession of the defendant but for a moment. He acquired no property in it. The whole was one continuous act; the defendant was but the conduit pipe to conduct the article purchased by the slave to him. In no sense was it a gift by defendant.

His Honor instructed the jury that, in law, the acts proved were a breach of the statute. In this there was error.

Per Curiam. Judgment reversed.

STATE *v.* JIM WRIGHT.

(Same point as in the preceding case.)

INDICTMENT against defendant, a free negro, for furnishing spirits to a slave, tried before ELLIS, J., at the Spring Term, 1857, of Perquimons Superior Court.

The indictment contained two counts, one charging that the defendant unlawfully did *sell and deliver* spiritous liquor to Sam, a slave; the other charging that the defendant unlawfully did *give* the spirituous liquor; both concluding against the statute. The proof stated was that Sam gave the defendant money, with a request that he would purchase for him, spiritous liquors, which he did—one quart—and delivered it to said slave.

There were several points taken below, which it is not necessary to be stated, as the opinion of the Court proceeds on other grounds.

The Court charged the jury that, upon the facts of the case, the defendant was guilty. Defendant excepted.

Verdict for the State. Judgment and appeal.

Attorney General, for the State.
Jordan, for the defendant.

NASH, C. J. The defendant in this case is a free man of color. The indictment is substantially the same as in the case of Hopkins, ante 305. In the first count, the defendant is charged with *selling* and *delivering* to the slave, Sam, the property of Mrs. Barron, a quart of spirits; and, in the second count, for *giving* the spirits. The facts of the case, though not exactly those set forth in the case of Hopkins, are sufficiently so to call for the same judgment. In the case sent up, his Honor states the first count was for delivering the spirits. The delivery to which the statute refers is a delivery as a gift. If there is no gift, there is no such delivery as brings the defendant within the operation of the statute. There certainly

was no sale by the defendant; nor was there, for the reasons mentioned in the case of Hopkins, any gift. From the manner in which the case is drawn up, it is evident that the main object was to obtain from this Court an opinion as to the correctness of the Court below, in the course pursued as to the verdict of the jury. Less attention, therefore, was paid by the Judge in stating the facts as to the main subject; but, as before remarked, sufficient appears to satisfy us that there was no breach of the law, as stated in the indictment.

It is not necessary, in the view we have taken of the case, to express an opinion upon the other question sent up.

The judgment below is reversed, and this opinion is to be certified to the Superior Court of Law of Perquimons County, that it may proceed to judgment according to law.

PER CURIAM. Judgment reversed.

JACOB H. HARTSFIELD *v.* ALLEGOOD JONES, *et al.*

Besides the ordinary office of supplying the place of an appeal, under peculiar circumstances, the writs of *certiorari* and *recordari* may be used as writs of error and false judgment, respectively; in which cases all that can be discussed is the error alleged to be apparent on the face of the record.

Where an action of assumpsit was brought upon an unliquidated account, a judgment given against the defendant, and an appeal taken to the County Court, upon a default in that Court, it was error to give judgment final for the sum recovered below, without an enquiry of damages.

THIS was a writ of *certiorari*, issued from the Superior to the County Court of Green County, heard before MANLY, J., at the Fall Term, 1856, of Green Superior Court.

The writ was issued on the petition of the defendant, Allegood Jones, alleging that a judgment had been taken against him before a justice of the peace of Greene County, for a sum certain, from which he had appealed to the County Court of that County, on giving bond, with the other defendants as

his sureties; that judgment final was entered at the return term of the appeal, against him and his sureties, for the sum recovered before the justice of the peace, without the ascertainment of damages upon an enquiry before a jury, and that an execution issued from that Court for the sum so adjudged. The petitioner alleges reasons for his not appealing from the County to the Superior Court, and various facts to show that, upon the merits of the case, the judgment was unjust and against law. He prays for a trial *de novo*, &c. On the return of the writ of *certiorari* upon the question of a new trial, various matters of facts were shown by the parties severally, upon which it was contended by the defendants that they should have a trial *de novo*, but that, at any rate, as they had not had the benefit of an enquiry of damages, the judgment of the County Court rendering a final judgment, should be reversed, and an interlocutory judgment be first ordered to enquire of damages.

The Court, upon consideration of the case, refused to give a new trial, and further refused to reverse the judgment of the County Court upon the matter of law, and ordered the *certiorari* to be dismissed. Whereupon the defendants appealed to the Supreme Court.

No counsel appeared for the plaintiff in this Court.
Rodman, for the defendants.

Battle, J. The writs of *recordari* and *certiorari* are used in this State, most commonly, as substitutes for appeals, where the appellants had, without default, lost, or been improperly deprived of their right of appeal; and in such cases they have been allowed a trial *de novo* upon the merits in the Superior Court. They may be used also, the former, as a writ of false judgment, and the latter, as a writ of error; in which case, all that can be discussed and decided in the Superior Court are the form and sufficiency of the proceedings in the inferior tribunals, as they appear upon the face of them. *Parker* v. *Gilreath*, 6 Ire. Rep. 221; *Webb* v. *Dur-*

ham, 7 Ire. Rep. 130; *Brooks* v. *Morgan*, 5 Ire. Rep. 481; *Commissioners of Raleigh* v. *Kane*, 2 Jones' Rep. 288. The writ of *recordari* lies to an inferior tribunal, whose proceedings are not recorded, and it is necessarily used as a writ of false judgment, because no writ of error can be brought upon the order, sentence or judgment, of such tribunals. 2 Sellon's Practice, 544.

The writ of *certiorari* lies to a court of record, and may be used for the same purpose as a writ of error in the regular form. It is true that, in the case of *Brooks* v. *Morgan*, above referred to, it is said by the Court that this writ has been used by necessity for the correction of errors in law, in those cases where the right of appeal has not been given. We cannot perceive any sufficient reason why it may not be so applied in all cases, as it will be but another form of the writ of error. That writ, in England, issues out of the Court of Chancery, but here we have no office in our Court of Chancery out of which to issue a writ. It must, therefore, be issued from the superior to the inferior court of record, and whether it be, in the well known form of the *certiorari*, or in any other form, can make no difference in the rights of the parties litigant.

The writ of *certiorari*, in the case now before us, was treated in the Superior Court solely as a writ of error, and his Honor decided upon the errors assigned against the plaintiff in error. The appeal from that decision brings before us the whole record, and it is made our duty to render such judgment, as upon inspection of it, it shall appear to us ought, in law, to be rendered thereon.

The suit commenced before a single justice, by a warrant on a medical account for twenty-five dollars. The justice gave a judgment for seven, and the defendant appealed to the County Court, giving bond with two sureties, for the appeal. The principal defendant did not enter any pleas in that Court, and the plaintiff took judgment by default final for seven dollars. The defendant contends that the plaintiff had no right to take a final judgment, but was entitled to an inter-

locutory judgment only, upon which he could not have a final judgment until he had his damages ascertained upon a writ of enquiry. In this we think he is right. The warrant which stands for a declaration is clearly in assumpsit. Upon a default in that action, which sounds in damages, the judgment is necessarily interlocutory, and no final judgment can be had until the damages have been ascertained upon a writ of enquiry. Step. on Pl. 105 ; 1 Ch. Pl. 122. In treating of the "election of actions," Mr. Chitty says, "the action of debt is frequently preferable to assumpsit, or covenant, because the judgment in debt upon a *nil dicit*, &c., is, in general, final, and execution may be taken out immediately, without the expense and delay of a writ of enquiry, which is usually necessary in assumpsit, or covenant, in the case of judgment by default." See page 242. The Act of 1808 (1 Rev. Stat., ch. 31, sec. 96. Rev. Code, ch. 31, sec. 91) obviated this difficulty in suits upon bills of exchange, promisory notes, and signed accounts, by authorising the clerk to ascertain the interest which might have accrued thereon, without a writ of enquiry, and directing the amount thus ascertained to be included in the final judgment of the Court. The 105th section of the same chapter of the Revised Code, has a provision, (which is not to be found in the Revised Statutes,) having in view the same object in the case of appeals from the judgment of a justice to the County, or Superior Court. After enacting that, in the case of an issue, it shall be tried at the first term, it proceeds to declare that, "when the defendant shall make default, the plaintiff, on such demands as are mentioned in section 91 of this chapter, shall have judgment in the manner therein provided, and, in other cases, may have his enquiry of damages executed forthwith by a jury." The last paragraph clearly recognises the necessity of such writ in those actions which sound in damages, such as covenant and assumpsit.

Our opinion is that the judgment of the Superior Court is erroneous and must be reversed, and this must be certified as the law directs, to the end that the judgment of the County Court may be reversed, and that an interlocutory judgment,

that the plaintiff's recover be entered, upon which he may have his writ enquiry executed preparatory to his final judgment.

PER CURIAM. Judgment reversed.

Doe on the demise of FLORA CAMPBELL *v.* WASHINGTON A. BRANCH.

Where, in the description of a tract of land, an ascertained, or natural object is called for, the same must be reached by one straight line, irrespective of course and distance; and when such ascertained, or natural object is of an extensive character—such as another tract of land, a river, or a swamp, this line must be run to the nearest point in such object, likewise disregarding course and distance.

ACTION of EJECTMENT, tried before PERSON, J., at the Spring Term, 1857, of Harnett Superior Court.

The only question in the case was as to the correctness of his Honor's instruction to the jury, in respect to a line in one of the conveyances produced in evidence. One of the calls in this deed was for "McNeil's land." The distance called for would not reach McNeil's land, nor would the line, extended according to the course called for, touch this land. His Honor instructed the jury that this line must be run according to the call in the conveyance, and from the point where the distance gave out, McNeil's land must be gone to by the nearest straight line. To this instruction plaintiff excepted.

Verdict and judgment for defendant. Appeal by plaintiff.

Shepherd, for plaintiff.
N. McKay, *Haughton* and *Kelly*, for defendant.

BATTLE, J. We do not concur in the opinion expressed by his Honor in the Court below, as to the manner in which

the line calling for McNeil's land should be run; and we think it probable that he was misled by what was said by Chief Justice RUFFIN in the case of *The President and Directors of the Literary Fund* v. *Clark*, 9 Ire. Rep. 58. The call contained two descriptions, which were found to be inconsistent. In such a case it is well established by numerous adjudications, that the description about which there is the least liability to error, must be adopted, to the exclusion of the other. It is equally well settled that the call for the line of another tract of land, which is proved, is more certain than, and shall be followed in preference to, one for mere course and distance; *Carson* v. *Burnett*, 1 Dev. and Bat. Rep. 546; *Gause* v. *Perkins*, 2 Jones' Rep. 222; *Corn* v. *McCrary*, 3 Jones' Rep. 496. In the case before us, McNeil's land is identified by the proof, but the course and distance will not reach it. If the course would lead to it, then the distance only would be disregarded, and the line would be extended to the land mentionod. Such were the decisions in all the cases relied on by the defendant's counsel; *Standin* v. *Bains*, 1 Hay. Rep. 238; *McPhaul* v. *Gilchrist*, 7 Ire. Rep. 169; *Literary Fund* v. *Clark*, *ubi supra*. It is true that, in the latter case, RUFFIN, C. J., said that, if the third line, when extended, would not reach the lake at all, then the course must be followed to the end of the given distance, and then be changed, so as to go directly to the lake. This proposition was unnecessary to the decision of the cause, because the line, when extended in the given course, did reach the lake; and we suppose it was stated without much reflection whether it was supported by principle or by previous adjudications. We do not think it can be supported by either. We are not aware of any adjudged case in its favor, and it is liable to the strong objection of introducing into the call, two lines, when one is given. The two lines may have the effect of including much more, or much less, land than the quantity granted. The grantor supposed that one straight line would run a certain course and distance to the land mentioned. In this he is found to have been mistaken, and we have already seen

that effect must be given to his grant by following the more certain description. This must be done by running a straight line to the land, or other object called for, disregarding altogether the erroneous description of the course and distance. When the object designated has a considerable extension—as in the case of a river, swamp, or the line of another tract of land, then the disputed line must be run to the nearest point on said river, swamp, or line of another tract; *Spruill* v. *Davenport*, 1 Jones' Rep. 203. *Venire de novo.*

PER CURIAM. Judgment reversed.

STATE *v.* JAMES ROSS, *et al.*

To make a tresspass for an entry on land indictable, it must be committed *manu forti*, in a manner which amounts to a breach of the peace; or (according to some authorities) which would necessarily lead to a breach of the peace, if the person in possession were not overawed by a display of force, and thus be induced to forbear from resistance.

Where, therefore, one, having a right to enter on land in the possession of a tenant at sufferance, went with four others, and commenced building on the land outside of the tenant's enclosure, without invading his dwelling, or molesting his enclosure, without any display of arms, or actual breach of the peace, it was *held* not to be indictable.

Whether at the *common law*, one who has the right of entry may not use force, if necessary, to assert his right, is an unsettled question.

INDICTMENT for a FORCIBLE TRESPASS, tried before PERSON, J., at the Spring Term, 1857, of Stanly Superior Court.

Godwin Hinson, a witness for the State, testified that he was in possession of a tract of land, which he had previously sold to the defendant, James Ross, under a parol agreement that he was to remain there for ten years, which term had not expired; that while so in possession, the five persons named in the indictment came to the land with a wagon loaded with provisions and some household furniture, for the pur-

pose of taking possession; that he was present when they came, and forbade their entering on the premises, but they did so against his will, and began to erect a house outside of the enclosure within which his own house was situated, and that they, or some of them, continued there for several weeks.

The Court instructed the jury that, if the facts stated by the witness were believed by them, they should find the defendants guilty. Defendants excepted.

Verdict and judgment for the State. Appeal by the defendants.

Attorney General, for the State.
No counsel for defendants.

Pearson, J. We are told by the Attorney General that this was treated as an indictment at common law, for the purpose of giving the State the benefit of the testimony of Hinson, who was not a competent witness in a proceeding under the statute. The question is, has the state made out a case indictable at common law? The indictment is strong enough, but the evidence does not sustain the allegations. The case made upon the facts is this: Hinson sold and conveyed the land to Ross, but remained on it under an alleged parol agreement, "that he was to remain there for ten years." Ross, in company with four others, went to the land, taking with him a wagon loaded with provisions, and some household furniture, for the purpose of taking possession. Hinson was present and forbade them to enter, but they did enter against his will, and began to erect a house outside of the enclosure where Hinson's house was situated, and some of them continued there for several weeks. His Honor was of opinion that these facts made out an offence indictable at common law. We do not think so.

To make a trespass indictable, it must be committed *manu forti*, in a manner which amounts to a breach of the peace; or, according to some of the cases, which would necessarily lead to a breach of the peace, if the person in possession is

not overawed by a display of force, so as to be induced to surrender and give up the possession, because resistance would be useless. Unless this degree of force is resorted to, the trespass is a mere civil injury, to be redressed by action.

The courts should keep a steady eye to this distinction, because individuals are under great temptation to convert civil injuries into public wrongs, for the sake of becoming witnesses in their own cases, and of *saving costs.*

We can see nothing in this matter, even as told by Hinson himself, that can magnify it into an indictable trespass. There was no breach of the peace—no display of arms or "multitude of people"—nothing of "the pomp and circumstance of war" calculated to frighten a man of ordinary firmness. Hinson was not expelled and put out of possession. His dwelling-house was not invaded, and his enclosure was unmolested. It was, at most, a mere civil trespass.

We do not feel at liberty to take into consideration the fact, that according to the evidence, Ross was the owner of the land, and had a *right of entry*—the alleged parol lease for ten years being void, and Hinson being in effect a mere tenant at sufferance, because we find it an unsettled question, whether one who has a right of entry may not use force, if necessary to assert his right, according to the common law. It is not necessary for us to enter upon this debateable ground in order to dispose of this case. 1 Hawk. Pl. Cr. ch. 28, (page 495). "It seems that at common law, a man disseised of any land (if he could not prevail by fair means) might lawfully regain the possession thereof by force." "But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience, to be very prejudicial to the public peace, it was thought necessary, by many severe laws, to restrain all persons from the use of such violent methods of doing themselves justice."

Blackstone, whose book on criminal law is of the highest authority, follows Hawkins, 4 vol. 148. "An eighth offence against the public peace is that of a forcible entry and detainer,

which is committed by violently taking, or keeping possession of lands, with menaces, force and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away, or barred." "But this being found very prejucial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they had no justice in their claim."

In *King* v. *Wilson*, 8 Term. Rep. 357, the correctness of this view of the common law is questioned in the remarks which fell from the Judges in delivering their opinions. But on a subsequent day of the term they felt called on to explain, and Lord KENYON says, "perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says: "that at common law the party may enter with force into that to which he has a legal title; but without giving any opinion concerning that dictum one way or the other, but leaving it to be proved, or disproved, whenever that question shall arise, all we wish to say is, that our opinion, in this case, leaves that question untouched; it appearing by this indictment that the defendants *unlawfully* entered, and, therefore, the Court cannot intend that they had any title." That was upon a demurrer.

So, in the *State* v. *Whitfield*, 8 Ire. Rep. 315, the Court throws a doubt upon the view of the common law, as laid down by Hawkins and Blackstone, and reference is made to "Wilson's case." But the matter was before the Court upon a motion in arrest of judgment, and, as was done in Wilson's case, the point is left undecided. Perhaps it will be found that the authorities may be reconciled on this distinction: One having a right of entry, may, at common law, use force, provided it does not amount to an actual *breach of the peace;* whereas one, not having a right of entry, is guilty of a trespass, indictable at common law, if he enters with a strong hand, under circumstances calculated to excite terror, although the

force used does not amount to a breach of the peace. This, however, is merely a suggestion. *Venire de novo.*

PER CURIAM. Judgment reversed.

C. F. ROBERTS *and Wife, et al., v.* FRED. W. WATSON.

The grammatical construction of a clause in a bequest will be disregarded, if it becomes necessary, in order to arrive at the intention of the testator.

Where one bequeathed a female slave to A, a son, for life, remainder to B, a son of A, and added: "and if the said woman hath increase, to be equally divided among all *his* children," it appearing that, at the time the will was written, A had several children besides B, but B had none at that time, though he had children afterwards, it was *held* that the pronoun, "his," referred to the children of A, and not to those of B.

ACTION of DETINUE for slaves, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1857, of Rockingham Superior Court.

The controversy in this case arises on the following clause of the will of Isabella Martin, viz: "1st. I give and bequeath to David Scott, my son, one negro woman, Pat, during his life, and at his death, to his son Andrew, and if said woman hath increase, to be equally divided among all his children."

The suit is brought by the plaintiffs, who are the children of Andrew, against the defendants, who are the children of David Scott, for slaves, who are the descendants of the woman Pat.

Isabella Martin died in I820. The will was made in 1813, at which time Andrew Scott was a single man without children, and Pat, at that time, had no children; but David Scott, besides Andrew, had several other children, and has had others born to him since, all of whom, except Andrew, are defendants in this suit. David Scott, the life-holder, died before this suit was brought, in possession of the slaves in question, and on his death they went into the possession of the de-

fendants. The foregoing facts were stated in a case agreed, and submitted to the judgdment of the Court, with a further agreement that, if his Honor should be of opinion with the plaintiffs, a judgment was to be rendered for the plaintiffs, and that the values stated in the writ be taken as the true values; but if of a different opinion, a judgment of nonsuit should be rendered.

On consideration of the case, the Court decided for the defendants, and the plaintiffs took a nonsuit and appealed.

McLean and *Ruffin*, for plaintiffs.
Morehead and *Miller*, for defendants.

Nash, C. J. The case arises under the first clause of the will of Isabella Martin. By it, she gives to her son, David Scott, as follows: "I give and bequeath to David Scott, my son, one negro woman Pat, during his life, and at his death, to his son Andrew, and if said woman hath increase, to be equally divided among all his children." David Scott died before this suit was brought, and, at the time Isabella Martin made her will, had other children besides Andrew, and, at the time of his death, others were born. It is agreed that, at the time of the bequest, Andrew Scott had no children, and that the negro woman had no increase, and that the slaves in question are the offspring of Pat, born since the publication of the will. It is further agreed that the plaintiffs are the children of Andrew Scott, and the defendants the children of David Scott. The plaintiffs contend that the pronoun "his," in the close of the item, and preceding the word "children," refers to the children of Andrew; the defendants, that it refers to the children of David Scott, and of this opinion is the Court.

It is a rule of grammar that the pronoun refers to the next preceding antecedent. Grammatical construction, therefore, would require us so to refer it in this case, if we were not satisfied from the clause itself, such was not the meaning of the testatrix; *Jones and others* v. *Posten*, 1 Ire. Rep. 170. The case agreed states that, at the time the will was written, Da-

vid Scott had other children besides Andrew, and the latter had none. The clause, it must be admitted, is very obscurely written. We think, however, the difficulty is occasioned by the want of proper punctuation. It is obvious that the prominent idea in the testatrix's mind, in this clause, was the making provision for her son David, and for Andrew, the son of David. In the first part of the item under consideration, she effects her purpose by giving David a life-estate in the slave, Pat, and the absolute property in her, in remainder, to Andrew. Here, then, was an entire disposition in Pat. But it occurred to the mind of the testatrix, that in making this disposition of her, if she should have children, (and she was then young,) she would be giving Andrew an undue proportion of her property over his brothers and sisters. She then proceeds to distribute Pat's children, if she should have any. When she disposed of Pat, one prominent subject was arranged, and there ought to have been either a full stop, or a colon, or a semi-colon, marking either the change of the subject matter, or a pause, or rest in the operations of the testatrix's mind. After disposing of Pat, she resumes the subject by disposing of Pat's offspring: "if said woman hath increase, to be equally divided among all his children." These clauses are to be considered as parts of distinct sentences containing distinct gifts. In this view, whose children are meant? We think David's children. Why should she single out Andrew as the peculiar object of her bounty, to the entire neglect of David's other children. And why should she prefer Andrew's children, if he should have any, to David's other children. The latter were nearer in degree to her than the former. They were known to her. We admit the solution of the question is not without its difficulties, and, in such case, we think it more safe to decide in conformity to the dictates of nature, than to violate her laws. By referring the last pronoun to David's children, equal justice will be done to all, and we are at liberty to presume that such was the intention of the testatrix. See *Jones and others* v. *Posten*, *supra*. This idea is confirmed by the use of the word "all." She meant, we

think, obviously, all of David's children, of whom Andrew was one. We concur in opinion with the Judge below. There is no error.

PER CURIAM. Judgment affirmed.

JOHN A. AVERITT *v.* ELIJAH MURRELL, JR.

For one, clearing a new ground, to let fire escape into his wood-land, whereby an extensive and injurious burning of the woods ensues, it is not such a setting fire to his own woods as is contemplated in the Act of Assembly. Revised Code, ch. 16.

ACTION of DEBT, for a penalty commenced by a warrant, and brought to the Superior Court of Onslow County by appeal, where it was tried before BAILEY, J., at the Spring Term, 1857.

The action was brought for the penalty of $50, given by the Act of Assembly, Revised Code, ch. 16, for unlawfully setting fire to woods. The warrant alleges that the defendant "did set fire to a certain piece of his own woods, in the said County, adjoining the wood-lands of complainant and others, in said County, without giving two day's notice to the owners of the adjoining wood-lands, contrary to our Act of Assembly," &c.

The facts were, the defendant had fenced in a portion of his own wood-land, and was engaged in clearing it about the time of the alleged wrong; to this end, he had had the timber cut down and piled up for burning; the nearest of these log-heaps was twenty-five or thirty yards from the wood-land of the defendant, and several hundred yards from that of the plaintiff. On the day charged in the warrant, the defendant ordered his slaves to set fire to these log-heaps, and to burn them up. They raked the trash away from the log-piles carefully, and in the morning, while the weather was calm, did set fire to

the logs. Afterwards, the wind blew with great violence, and carried the sparks to the neighboring wood-land, whereby the woods took fire, and the flames reached the plaintiff's wood-land, and burnt his cultivated turpentine trees, and did him considerable damage.

Upon these facts, his Honor intimated an opinion that the plaintiff could not recover, whereupon he submitted to a nonsuit and appealed.

No counsel appeared for the plaintiff.
Wm. A. Wright, for defendant.

Battle, J. We cannot imagine how, in any proper sense, the burning of log-heaps in one's own enclosed field, can be called burning his woods. The term "woods," as used in the statute, (see Rev. Stat., ch. 16; Rev. Code, ch. 16, sec. 1) means forest lands in their natural state, and is used in contradistinction to lands cleared and enclosed for cultivation. The statute is a penal one, and must, therefore, be construed strictly; but, whether construed strictly or liberally, we are clearly of opinion that the facts proved do not bring the defendant either within the letter or spirit of it. The judgment must be affirmed.

Per Curiam. Judgment affirmed.

JOHN A. AVERITT *v.* ELIJAH MURRELL, JR.

Where a person working in his new ground, within twenty-five yards of woods, puts fire to log-heaps, when the weather is calm, but afterwards, the wind arose and drove the fire with irresistible violence into the woods, he is not guilty of negligence, so as to subject him for damages done by the fire.

This was an action on the case, tried before Bailey, Judge, at the Spring Term, 1857, of Onslow.

The action was brought on the Statute, ch. 16, Rev. Code, for unlawfully firing the woods. The facts are as stated in the preceding case.

His Honor charged the jury, upon those facts, that every one had a right to use and exercise dominion over his property, in such manner as he thought best; but in the exercise of this right, he must take care not to do any injury to the property of another; that if he was guilty of negligence, either by his own act, or by the act of his servant, in the use of his property, and thereby damage was sustained by another, he would be liable for such damage; that, in this case, if the defendant directed his negroes to put fire to the logs, and they did so when the wind was blowing in the direction of the plaintiff's land, and by reason of the wind, the fire was carried to the plaintiff's land and burnt his trees, the defendant would be responsible for the negligent conduct of his servants, and they ought to find a verdict for the plaintiff; that if, on the contrary, they should be satisfied that, when the fire was put to the logs, the weather was good and calm, and the wind arose afterwards, and blew with such violence as to carry the fire so that it could not be stopped or extinguished, the plaintiff could not recover.

The plaintiff's counsel asked the Court to instruct the jury that, if the land set fire to by the defendant was wood-land, the defendant would be responsible. Which his Honor declined to do. Plaintiff excepted.

Verdict for defendant. Judgment and appeal by plaintiff.

No counsel for plaintiff in this Court.

W. A. Wright, for defendant.

Battle, J. We think the law applicable to the case was fairly and fully expounded by the presiding Judge; and, for the reasons given by his Honor, we affirm the judgment. The instruction prayed by the plaintiff's counsel had no facts upon which to be based, and his Honor acted right in refusing it.

Per Curiam. Judgment affirmed.

ALFRED BOYKIN *v.* J. W. PERRY *et al.*

Whether a verdict is against the weight of the evidence, is a matter solely to be determined by the Judge trying the cause, and the question of a new trial on that ground, must be conclusively decided by him.

If a Judge omits to state the testimony as fully as counsel wish, he ought to be requested, before the jury retire, to make his statement of the evidence more full, but it is not a ground for excepting to the charge where no request of that kind has been made.

ACTION of TROVER, tried before his Honor, Judge BAILEY, at the Spring Term, 1857, of Wilson Superior Court.

The suit was brought for the conversion of a quantity of turpentine, in barrels. The plaintiff alleged that he had purchased the turpentine in question, from one Masen, through his agent, one Stephen Boykin. The defendants had the turpentine levied on and sold as the property of Stephen Boykin, under a judgment and execution in their behalf against him.

Stephen Boykin was examined, as a witness, in behalf of the plaintiff, and was closely cross-examined by the defendants' counsel with a view of discrediting him. Several witnesses were also called to prove that he had made contradictory statements, and there was evidence tending to confirm his evidence.

The counsel on both sides declined arguing the case before the jury, but submitted it under the charge of the court.

The court charged the jury, that it was for them to decide whether Stephen Boykin had, as agent for the plaintiff, purchased the turpentine for the plaintiff, or for himself; that if purchased for himself, the verdict should be for the defendant; if he purchased it for the plaintiff, then plaintiff had a right to recover.

Under these instructions the jury found a verdict for the plaintiff.

Upon a rule for a new trial, the defendant stated his grounds to be,

1st. That the verdict was against the evidence in the case.

2ndly. That the court stated the evidence of Stephen Boykin with greater fullness than it did the evidence of the defendant's witnesses.

3rdly. That the court did not, in his charge, advert to the deportment of the witness Boykin upon his cross-examination.

The Court refused to grant a new trial, and discharged the rule, upon the ground, that there was no complaint of his charge before the jury went out, and no request made for him to charge more fully, or differently, from what he did charge. Appeal by defendant.

Dortch, for plaintiff.
Miller and *Lewis*, for defendant.

Nash, C. J. When the evidence in this case was closed, the counsel on each side declined to argue it, and submitted it to the jury under the charge of his Honor. The jury returned a verdict for the plaintiff, when the defendant moved for a rule upon the plaintiff to show cause why there should not be a new trial, upon three grounds: *First*, because the verdict was contrary to the weight of the testimony. 2nd. That the Court stated the evidence of Stephen Boykin with greater fullness than it did the evidence of the defendant's witnesses; and 3rd. That the Court did not advert, in its charge, to the deportment of the witness Boykin, upon his cross-examination, as proper for their consideration. The rule was discharged.

As to the first ground, we have nothing to do with it. It was properly addressed to the Court, before whom the cause was tried, as an appeal to its discretion in granting a new trial. Our attention is confined to errors of law.

The 2nd and 3rd exceptions cannot be sustained, for the reasons given by his Honor. No argument, either upon the law of the case, or upon the evidence, was submitted by the counsel to the jury. This, however, did not deprive them of the privilege of excepting to the charge if they thought proper. It is now a well-settled principle of practice, that an

omission of the Judge to charge the jury on any particular point of law, is not error. If the party complaining deem it material to his case, he must ask for instruction on it; *State* v. *O'Neal*, 7 Ire. Rep. 253. It is not error for a Judge to omit charging upon a part of the testimony, if no particular instruction be requested; *State* v. *Scott*, 2 Dev. and Bat. 35. Nor is he bound to charge on all the points of the case, or recapitulate all the evidence in his charge; *McNeil* v. *Massey*, 3 Hawks' 91; *State* v. *Morris*, 3 Hawks' 388. It was the duty of the counsel after the charge was delivered, and before the jury retired to consider of their verdict, to have requested his Honor to give the jury a fuller statement of the evidence of his witnesses, and draw the attention of the jury to the conduct of the witness Boykin on his cross-examination, in order to enable the Judge to supply any omission on his part. But this was not done by the counsel, and there is no error in his Honor's charge. If his attention had been called to the alleged omission, and he had refused to charge as required, and his refusal was wrong, it would have been error. The propriety of the rule of practice adverted to, is fully exemplified in this case. No argument was submitted to the jury on either side, and his Honor might well suppose that no elaborate charge was either expected or desired by the parties.

We do not approve of the practice of asking a Judge, after he has finished his charge, for instruction on some particular point to which his attention has not been drawn during the course of the argument.

Per Curiam. Judgment affirmed.

HELEN L. WAKEFIELD *v.* SIMEON M. SMITHWICK.

Where, in an action for defamation, it appears that a defendant, authorised by his relation to the party addressed, to make a "privileged communica-

tion," in professing to do so, makes a false charge, the inference of malice is against him, and the burden is put upon him to show that he acted *bona fide*.

Where a party authorised to make a *priviledged communication*, stated false matter, and his Honor left it to the jury to say whether, "in communicating what he had heard and believed to be true," he acted in good faith, and there was no evidence that he had heard any thing, nor none as to how he believed, it was held to be error.

It is error to leave a jury to draw inferences without evidence.

ACTION on the CASE for a libel and for slanderous words spoken, tried before MANLY, Judge, at the Spring Term, 1857, of Martin Superior Court.

Pleas, "general issue" and "privileged communication." Miss Bridgman was the proprietor of two schools, one at Plymouth and the other at Williamston. She had employed the plaintiff to teach at the latter place, and while she was attending to her school at Plymouth, she left the plaintiff to board in the family of the defendant, and under his care and protection. While the plaintiff was thus boarding at his house, the defendant wrote to Miss Bridgman of, and concerning the plaintiff, the following letter, viz:

"WILLIAMSTON, 22nd February, 1853.

"Miss Bridgman—Madam: I deem it my duty to inform you that I have discharged Miss Wakefield from boarding at my house, her conduct, as I thought, was unladyfied, and as such, I told her unless it altered, she must look another boarding house; so she has left and gone to Mr. Jordan. I think, Madam, that your school will shortly be broken up unless there is a change. Her conduct was, that she was walking the streets at a late hour of the night with a young man in this place, and would meet at Jew Cohen's, and the curtains would be dropped, and they left by themselves. Such conduct I could not stand at my house, so she and Mr. Ward has both left my house. I am assured, madam, that you cannot get five scholars to the next session, if she is to be the teacher. I want you to come up as I can tell many than I can write.

Your ob't. friend, &c."

The letter was mailed for transmission to Plymouth, where Miss Bridgman was superintending the school at that place. She arrived at Williamston on the evening of the day on which the letter was mailed, and without having received it, she, on the same day, discharged the plaintiff from teaching in the school. Miss Bridgman testified that she received the letter at the defendant's house, within two days after it was written; that she did not remember by whom it was delivered to her; that she might have known that the defendant had sent her a letter, but she had not seen it, and it did not influence her in discharging the plaintiff.

It did not appear whether the defendant knew of plaintiff's discharge from the school when the letter was put into Miss Bridgman's hands.

There was evidence tending to show that the allegations in the letter were untrue. The plaintiff also proved the utterance, by the defendant, of the language of the letter, and other words of similar import to several other persons. This was after writing the above letter, and in reply to enquiries made of him, why he had turned off the plaintiff as a boarder.

The defendant offered no testimony, but contended that the circumstances under which the letter was written, and the words spoken, repelled the idea of malice; that they were privileged communications; and, moreover, that they did not constitute a charge of incontinence.

The plaintiff's counsel contended that the letter was not a privileged communication; that if the relation of the parties justified a privileged communication, it did not justify such a one as was made; that it appeared from the proof, that the statements in the letter were false, and the communication being *prima facie* actionable, malice was an inference of law, which the defendant had not rebutted.

His Honor charged the jury that it was not necessary for the language of the libel to import incontinence in order to make it actionable. If it were calculated socially to degrade the plaintiff, and if it were untrue, it would be libelous.

Upon the point of privilege, the Court instructed the jury that, if Miss Bridgman, to whom the letter was addressed, and in whose employment plaintiff was, gave the defendant charge over her as stated, and the defendant wrote the letter in fulfillment of that charge, communicating what he had heard and believed to be true, the defendant would not be liable in damages; the presumption of malice arising from the publication of untrue, libellous matter, would, in that case, be rebutted. But if the defendant had no such charge; or having it, if the publication was made out of malice, he would be liable. Plaintiff excepted.

With respect to the words spoken, they were left to the jury to enquire whether they imported an allegation of incontinency against the plaintiff, with instruction, if they believed they did, to find damages for the plaintiff, as there was no question of privilege applicable to this count in the declaration.

The jury found in favor of the defendant. Judgment and appeal by plaintiff.

B. F. Moore and *Winston, Jr.*, for plaintiff.
Rodman, for defendant.

Pearson, J. When a defendant in an action for a libel pleads justification, he takes upon himself the burden of proving that the libellous matter is true in point of fact. The defense, under the doctrine of privileged communication, is much broader, and much more favorable to the defendant; for if he succeeds in proving such a relation between himself and the person to whom the communication is made, as authorises him to make it, the burden is upon the plaintiff to prove that it was not made *bona fide* in consequence of such relation, but out of malice, and that the existence of such relation was used as a mere cover for his malignant designs. When, however, the plaintiff shows that the matter communicated was false, the question of *bona fides* becomes an open one, and the defendant is called on for some explanation to meet the infer-

ence arising from the fact that he has communicated false information. For unless it appears that he was mistaken, and had innocently fallen into error, as that he had probable cause to believe what he communicated to be true, or took up the impression from what had been told him, or from what had become town gossip, or that the plaintiff's conduct was so imprudent as to have become a fit subject for observation; in other words, unless he can offer some sort of explanation, the fact of the matter communicated being *false*, puts it out of his power to say that he made it out of tenderness to the party who had been left under his protection, or out of regard to the interests of the party who had imposed the charge upon him, and not out of malice. In the consideration of this question, the character and general tone of the communication made, will, of course, be matter for the jury. There is some conflict among the cases, but this we believe to be the principle established by them. It is commended by its good sense, and is certainly calculated to hit the merits of such questions. *Fountain* v. *Boodle*, 43 E. C. L. Rep. 605.

Tested by this principle, there is error in the charge of his Honor, and the plaintiff has ground to complain of the manner in which the case was put to the jury. His Honor, after holding that the letter was libellous, and that if the evidence was believed, the communication was privileged, tells the jury that, if the defendant wrote the letter in fulfillment "of the charge confided to him, *communicating what he had heard and believed to be true*, in good faith, and not out of malice, he was not liable." The statement does not set out any evidence in regard to what the defendant *had heard*, or any facts tending to show that he did not communicate the matter as being of his own knowledge, or tending to show that he believed it to be true, or had probable cause so to believe. It is error to leave a jury to draw inferences without evidence.

It is not necessary to advert to the count for verbal slander.

Venire de novo.

Per Curiam. Judgment reversed.

WILLIAM H. WINDER *v.* JOSEPH BLAKE, *et al.*

A license to enter upon land, and to take fish, cannot be implied by proving a usage, or custom in the Country at large, for every person to enter upon such lands and take fish.

An indefinite number of persons are not capable of taking by grant, nor are they capable of accepting a license, except in the case of inn-keepers, shop-keepers, and the like, who undertake to serve the public.

No custom can be recognised as having grown up in this Country, the effect of which is to supercede the common law.

ACTION of TRESPASS, q. c. f., tried before MANLY, Judge, at the Spring Term, 1857, of Wake Superior Court, to which the defendants pleaded general issue and license.

The plaintiff showed title to the *locus in quo*, which consisted of four acres, with a mill and dam, which had been broken since 1852, and washed out, leaving the mud-sill exposed and the water low. The defendant Fowler, resided in the miller's house, on the premises, by leave of the plaintiff, but whether as a tenant at will or as a servant or agent, did not distinctly appear; nor did it clearly appear to what extent his occupation reached; there was, however, no other occupation of the premises.

In the month of August, 1854, the defendants Blake and Sorrell, went to the premises in a Buggy, and the defendant, Fowler, in their presence, cut away a portion of the mud-sill, to fish the pond more conveniently, and then, with a sein, assisted by Blake, fished the pond and caught fish. The fish were put into a buggy, in which Sorrell and another person, not a party to this suit, rode, and were carried off.

There was evidence tending to show a common custom and consent on the part of the public, and the owners of such streams and places, to fish in the same without let or hindrance. The plaintiff contended, 1st, that a license to acts of the kind complained of could not be inferred from usage.

2nd. That if Fowler were guilty, the others were so, provided they took a benefit from his trespass, and

3rd. That by cutting the sill, the defendants became trespassers, *ab initio.*

The Court instructed the jury that the action depended upon the possession of the *locus in quo* by the plaintiff. If he had possession so as to support the action, the defendant Fowler, would be guilty of a trespass, at any rate, in cutting the sill, and if the others aided and abetted, advised or councelled it to be done, they would also be guilty of that act of trespass.

With respect to the fishing, the Court instructed the jury that a license might be presumed from common custom and consent, until it was withdrawn, but if there was no common usage, they would all be guilty of the trespass in going upon the land to fish. Plaintiff excepted to the charge.

Verdict for the plaintiff, as to Fowler, and in favor of the other defendants. Judgment and appeal by the plaintiff.

Mason, for the plaintiff.
Miller and *Winston, Senr.*, for the defendants.

Pearson, J. There is error in the charge upon the subject of license. His Honor was of opinion that a license to commit the alleged trespass might be presumed from "common custom and consent." This language is general and indefinite. By reference to the evidence, we find it was proven that there was "a common custom and consent," in pursuance of which, every person, who felt so inclined, fished in such mill-ponds and places without let or hindrance on the part of the owners. His Honor left it to the jury, upon this evidence, to find that the plaintiff had given to the defendants permission to fish in his pond. There is no evidence that the parties had ever seen each other; so an express license is out of the question; and the point is, can a license be implied from a common custom, or common usage.

It may be well, for the purpose of having some precision and certainty in our investigation, to recur to the form of the plea of license. In trespass *vi et armis*, it must be pleaded

specially. The form is given in 3 Ch. Pl. 1107: "In further plea, &c.; because he says that he, the said defendant, at the time when, &c., by leave and license of the said plaintiff, to him for that purpose, first given and granted, to wit, at, &c., aforesaid, committed the said supposed trespasses in the said declaration mentioned."

When one, by a signboard, or otherwise, causes it to be known to all whom it may concern, that he is the keeper of a common inn, or shop for the sale of goods, and, in pursuance of this general invitation, an individual enters, if sued for doing so, his allegation that he committed the supposed trespass by leave and license of the plaintiff, "for that purpose first given and granted," is made out by proving that the plaintiff was a common inn, or shop-keeper. So, when when one is in the habit of permitting another to visit his house, if the latter should be sued for afterwards entering the house, license to do so may be presumed from the previous relations and acts of the parties, in the same way that agency is presumed from the fact, that one is in the habit of allowing his wife to take up goods at a store on credit, or of sending his servant with a verbal order for goods, which he afterwards pays for.

But that a defendant, in an action of trespass, can, as was insisted upon in the argument here, make out a plea of license to enter the *locus in quo*, and commit the supposed trespass by proving that this, being a "free country," everybody takes the liberty of going upon private property, and fishing in mill-ponds, and that the owners either do not care about it, or do not usually think it worth while to take the trouble necessary to put a stop to it, is a new idea, not to be met with in any of the cases, and wholly inconsistent with the right of private citizens to the exclusive enjoyment of their property.

The right to an easement may be acquired by prescription; it is based upon the presumption of a grant, and in order to establish it, there must be a person capable of making a grant —a thing capable of being granted, and a person capable of taking by grant. The right of entering upon private proper-

ty, may be acquired by the license of the owner, and in order to establish it, there must be a person capable of giving it—a thing permitted to be done, and a person to whom the license may be given; but certainty of person is as necessary to give effect to a license, as it is to a title by prescription. An indefinite number of persons, viz., "everybody," are not capable of taking by grant; neither are they capable of accepting a license. The case of an inn-keeper, shop-keeper, and the like, who *undertake to serve the public*, is an exception, and is put on the ground that, after an individual enters, the *generality*, in regard to the persons to whom license is offered, is made particular by the act of accepting and acting under it. But this exception has no application to property reserved for the private use of the owner.

The departure from the general rule, requiring certainty in respect to the person to whom a license is given, is made on reasons of public policy, for the encouragement of trade, &c.; hence the license in such cases is said to be given by law, as distinguished from a license given by the *party*, and for the protection of persons serving the public; because it cannot be known before hand what manner of person the customer may be. As the law gives the license, it makes a party abusing such license, a trespasser *ab initio*. *Six Carpenters' case*, 8th Rep. 146.

This suggests a further difficulty. The license pleaded must be co-extensive with the trespass. Now it is clear that the cutting of the sill does not come under the license to be presumed from common usage. So, for this excess, the plaintiff had a right to treat the defendants as trespassers *ab initio*, if the license is treated as given by law; or to take advantage of it by a new *assignment*, if it be treated as a license given by the party. *Six Carpenters' case*, *ubi supra;* the plaintiff being at liberty to consider the pleading thus remodeled by the understanding of the profession.

Pressed by these considerations, the very learned counsel for the defendants abandoned his special plea of "license," and insisted that, under the "general issue," or by remodeling

his plea, he could have the benefit of the custom, or common usage, of which there was evidence. Custom differs from prescription in this; it is confined to particular places; and to meet the objection, the counsel suggested that his plea, as remodled, alleged a custom in the County of Wake for every person, who was so inclined, to fish at seasonable times in the mill-ponds there situate. The custom proven was not confined to the County of Wake, but was general, and instead of a *special* custom, if it has any efficacy, it is entitled to the dignity of a *common* custom; and thus becomes a part of the common law. Waving this objection: "The law of the State is composed of the statutes, and all such parts of the common law as were heretofore in force, and in use, within this State, or so much of the said common law, as is not distructive of, or repugnant to, or inconsistent with, the freedom and independence of this State, and the form of government therein established." Rev. Code.

We did not import from the mother country any of the "special customs," which, in particular localities, are allowed to supercede the common law. All legislative power is vested in our General Assembly. We can recognise no other law-making power, and there is no intimation to be met with in any of our decisions, that special customs can grow up among us, whereby rights may be affected, or the common law be in anywise changed. By the common law an immaginary line is thrown around the land of every one, which may not be entered without subjecting the wrong-doer to an action. No custom or usage can change this law.

If the owner of land unreasonably refuses to allow his neighbors to fish in his mill-pond, or to gather strawberries in his old-field, the only correction is to arraign him at the bar of public opinion, for the violation of the rules of good neighborship.

As the case is to be tried again, it may be proper to remark that, although the charge in reference to cutting the sill is correct in the abstract, yet it was the province of the Judge to instruct the jury what amounts, in law, to aiding and abet-

ting. The want of particular instructions upon this subject is the only supposition by which we can account for the fact that the jury found in favor of the defendants, Blake and Sorrel, and made Fowler the *scape-goat.* The sill was cut in their presence, in order to fish more conveniently; the defendant, Blake, actually assisted in fishing, and the defendant, Sorrell, took the fish and carried them away. This amounted, in law, to aiding and abetting, and they ought to have been put on the same footing with Fowler. *Horton* v. *Hensley*, 1 Ire. R. 163.

PER CURIAM. Judgment reversed, and a *venire de novo.*

WILLIAM J. ROWLAND *v.* JOHN O. RORKE.

A contract to make good certain notes on another, received in payment for property sold by plaintiff to the defendant, provided the maker of such notes was not good for them at a certain day thereafter, is not within the meaning of the statute for the suppression of fraud.

ACTION of ASSUMPSIT, tried before MANLY, Judge, at the Spring Term, 1857, of Wake Superior Court.

The plaintiff, in the month of January, 1852, sold a slave to the defendant, at the price of $670, to be paid in two bonds executed by E. P. Guion, and transferred without endorsement, amounting to the price above stated. Guion being considered in doubtful circumstances, the parties entered into a special agreement, which was as follows: At the request of the defendant, the plaintiff was not to sue Guion until six months, or thereabouts, had expired. At the end of that time, if the bonds were not paid, the plaintiff was to go to the defendant and inform him of the non-payment, and the defendant was then to give instructions as to what should be done with the bonds, and if the bonds were not good, the defend-

ant was to make them good. Guion was apprised of the transfer of the bonds, and in a few days after the transfer, plaintiff called on him for the money, and received on them only a small sum. There was proof that, at the end of six months, the plaintiff went to the defendant and gave him information that the bonds were not paid, but it did not appear that, either at that time, or any other, the defendant gave the plaintiff any instructions what to do with them. The plaintiff, on the 15th of September of that year, brought suit against Guion on the bonds, and recovered judgment in February, 1853. Execution issued on this judgment, but no money was made, by reason of Guion's insolvency. It was proven that Guion was insolvent when the bonds were passed to the plaintiff, and continued so afterwards until the suit was brought; that before six months elapsed from the selling of the slave, all his property was conveyed, by deeds of trust, to secure others for amounts greatly beyond its value. The plaintiff proved a demand of the defendant before the bringing of this suit, and a refusal.

The Court charged the jury that the insolvency of Guion, and the inability of plaintiff to make the money out of him, would not sustain the action, unless, in addition thereto, the plaintiff went to the defendant at the end of six months, or thereabouts, for instructions; but if he did so, and Guion being insolvent, failed to pay, plaintiff was entitled to recover, unless the defendant gave instructions which the plaintiff refused to follow. Defendant excepted.

The jury returned a verdict for the plaintiff. Judgment and appeal by the defendant.

B. F. Moore and *G. W. Haywood*, for plaintiff.
Manly, *Miller* and *Busbee*, for defendant.

Nash, C. J. There is no error in the charge below. The contract sued on is in the nature of a guarantee under special circumstances. The plaintiff sold a slave the defendant, and took from him two bonds, or notes, executed by E. P. Guion to the

defendant. The notes were transferred without endorsement. At the time of the transfer Guion was in doubtful circumstances, and it was a part of the agreement in respect to the notes, that plaintiff should not sue Guion upon them until after six months had expired, or there abouts; at the end of this time, if the bonds were not paid, the plaintiff was to go to the defendant and tell him of it, and the defendant would then instruct the plaintiff what to do with them. The contract was made in January, 1852. An action was brought by the plaintiff upon the bonds, in Sep't., 1852. Judgment was obtained and execution issued, and was duly returned *nulla bona*. The plaintiff waited six months before bringing his action on the bonds; and, at the end of that time, notified defendant that Guion had failed to pay, and the defendant gave him no instruction what to do with the bonds. This is not a contract which comes within the Act for the suppression of fraud; for, though it is in some sense to answer for the debt of another, yet it is strictly the debt of the defendant himself, arising upon a new and original consideration, of loss to the plaintiff and benefit to the defendant. *Ashford* v. *Robinson*, 8 Ire. Rep. 116; *Farmer* v. *Rispass*, 11 Ire. Rep. 172. In every particular the plaintiff complied with his part of the contract. He gave to the defendant the required notice of the failure of Guion to discharge the bonds, and his cause of action then arose, as the defendant gave him no instruction as to his future movements upon them. Nor is the plaintiff's right of action at all affected by not suing the defendant sooner, or by not suing Guion sooner. But the defendant has suffered no loss by the delay, for the case shows that Guion was entirely insolvent at the time the contract was made, and has remained so ever since; and that before the six months expired, he had made an assignment of all his property to pay other creditors.

There is no error, and the judgment is affirmed.

Per Curiam. Judgment affirmed.

THE NORTH CAROLINA RAIL ROAD COMPANY *v.* JAMES T. LEACH.

Where a party made a contract, in writing, to take shares of the stock of an incorporated company for constructing a rail-road, under the authority of commissioners, it is not competent for him to prove, by parol, that he made such subscription on a condition as to the location of the road, which had not been complied with.

One of the commissioners appointed, with five others, at a given place, to take subscriptions, under the charter of the North Carolina rail-road company, had no right in doing so, to give any *assurances* as to the line of location that would be adopted for the road.

A stockholder in a rail-road company, who seeks to avoid the payment of his subscription, upon the ground that one of the *termini* was materially changed from that designated in the charter, must show that the alteration was made without his concurrence, or consent.

Whether, in this case, if he had objected to the change of the terminus, inasmuch as he had the power to prevent it by an injunction or mandamus, the Court would have regarded the defense as valid, Quere?

This was an action of ASSUMPSIT, tried before his Honor, Judge MANLY, at the Spring Term, 1857, of Johnston Superior Court.

The declaration was upon the following written contract, which it was admitted was signed by the defendant in the presence, and at the instance of Linn B. Saunders, one of the commissioners appointed to take subscriptions to the stock of the North Carolina rail-road company, viz:

"The North Carolina Rail Road."

"According to the provisions of the act of the General Assembly, entitled an act to incorporate the North Carolina Rail Road company, the subscribers do hereby severally promise and agree to, and with the said company, to take the number of the shares of the stock of the same affixed to our names respectively."

Names.	Number of Shares.	
J. T. Leach.	No. 5.	$500.

It was admitted that five *per cent.* upon the said subscription, to wit, $25, was paid by the defendant at the time of

making the same. The subscription was made in March, 1850, and the defendant was present, by his proxy, at the general meeting of the stockholders, on 11th of July, 1850, when the company organised by appointing a directory and other officers. It was admitted that calls were made for instalments, embracing the remaining amount of the defendant's shares, (deducting the 5 per cent.) and that being unpaid, the shares owned by the defendant were sold at auction, and the amount insisted on is the remainder after deducting the price for which said stock was sold.

There was a count upon an indebitatus assumpsit.

The defendant filed his special pleas as follows: General issue as to both counts. Plea the first as to the first count.

1. *Actio non*, &c.; because he saith that before the alleged subscription for stock in said North Carolina rail-road company he was informed, assured, and promised by the agents of the said rail-road company, that the line of the said rail-road should be so located and established as to run through the town of Smithfield, in the county of Johnston, within a short distance, not exceeding half a mile of the said town; upon which said promise and assurance this defendant relied, and upon the faith thereof, and in the belief that the said road would be so located as aforesaid, and upon that condition he, this defendant, subscribed for the stock mentioned in the said count; and this defendant avers that, but for said assurance and promise, and his reliance thereon, he would not have subscribed for said stock as aforesaid; and this defendant further saith, that the said rail-road hath not been located and established so as to run through said town of Smithfield, nor within the distance thereof as aforesaid, but the same hath been located so as to run more than two miles from the said town of Smithfield, that is, at the distance of miles therefrom; wherefore, this defendant saith that he has been deceived and defrauded in his contract of subscription, and that the condition aforesaid hath not been performed, but hath been violated and broken, wherefore, he saith, that he is not bound to perform the said contract of subscription, but that the same

is of no force, or legal validity, and this he, the said defendant, is ready to verify, &c.

2nd. And for further plea, in this behalf, to the said count, this defendant saith, that by the terms of the charter of the said company, granted by the General Assembly of the State, the said company were required to construct a rail-road from a point on the Wilmington and Raleigh rail-road, where the same crosses the Neuse river, in the county of Wayne, via Raleigh, &c., to Charlotte; and this defendant saith he subscribed, as mentioned in the plaintiff's declaration, in the faith and belief, that the said road would so be constructed as to commence at said point, and that said point would be a terminus of the said road, and he says that the said company have deviated from the charter by neglecting and failing to construct a road, having the said point as a starting point or terminus, but have varied therefrom, materially and essentially, by constructing a road commencing and having a terminus more than a mile from the said point; which this defendant says is not the road contemplated and authorised by the said charter: Wherefore, &c."

There was other special matter pleaded, but as the same is not involved in the view taken of this case by the Court, it becomes unnecessary to state it.

The plaintiff objected to the admissibility of the evidence upon the first special plea, but admitted its truth, if competent.

The Court decided it incompetent, and the defendant excepted.

The plaintiff admitted the truth of the second plea, but contended that it was no bar to the action.

All error was waived as to informalities in the pleadings.

His Honor, upon consideration of the case agreed, gave judgment for the plaintiff, and the defendant appealed.

B. F. Moore and *Husted*, for the plaintiffs.
Bryan and *Miller*, for the defendant.

Battle, J. We understand that the counsel for the par-

ties agree to waive all objections to matters of mere form in the first count of the plaintiff's declaration, and the first and second pleas of the defendant, that the cause may be decided on its merits as arising from those parts of the pleadings, without reference to the sale of the defendant's stock.

The first count of the declaration is upon a special contract, which it alleges, that the defendant has broken, by having failed to pay, when called upon, the instalments (except the first) becoming due, from time to time, on his subscription for stock according to the terms of the charter which gave a corporate existence to the plaintiff.

The first plea denies the liability of the defendant, for the reason, that at the time he made his subscription, he was assured by the agents of the plaintiffs that their line of road shonld be so located and established as to run through, or within half a mile of the town of Smithfield, in the county of Johnston, and that he subscribed upon the express condition that the road should be so run, and not otherwise: Whereas, the line of the said road, as actually located and established, did not pass within two miles of the said town.

The testimony offered in support of the issue raised by this plea, was, that at the time when he was about to subscribe for the stock, and before he made the subscription, Linn B. Saunders, one of the commissioners appointed to receive subscriptions at the town of Smithfield, by parol, informed and assured him, that the line of the road should run through that town, and that he made his subscription upon that assurance, and in consideration thereof.

The plaintiff, admitting that the road did not run through the town of Smithfield, and that the testimony, if competent, was true, objected to its introduction, upon the ground, that the terms of the subscription were in writing, and could not, therefore, be added to or varied by parol proof. The general rule is undoubtedly such as is contended for by the plaintiffs, and the questfon is whether the present case is an admisssible exception to it. We are clearly of opinion that it is not. The terms of the subscription, as expressed in writing, were,

that the subscribers promised and agreed to take the number of shares of stock affixed to their respective names, according to the provisions of the act of the General Assembly, entitled "an act to incorporate the North Carolina rail-road company." The provisions of that act, so far as the line of the road was concerned, were, that it was to run from the point on the Wilmington and Raleigh (now Wilmington and Weldon) rail-road, where it crosses the river Neuse, in the county of Wayne, via Raleigh and Salisbury to Charlotte. The route between these *termini* and given points was designedly left to be ascertained and fixed by the engineers, upon actual surveys. The contract between the parties, then, was that defendant agreed to take the number of shares of stock for which he made his written subscription in a rail-road, the line of which was to run according to the directions of the charter. It forms no part of such directions, either expressed or implied, that the road was to pass through Smithfield. A stipulation that it shall pass through that town, must therefore be either an additional stipulation, or the variation of a former written one, and being by parol, is clearly inadmissible.

The case differs very materially from those of *Twidy* v. *Saunderson*, 9 Ire. Rep. 5; *Manning* v. *Jones*, Busb. 368; *Daughtrey* v. *Boothe*, 4 Jones' Rep. 87; where the parol contract, though made at the same time, and relating to the same subject-matter, was in its nature, necessarily separate and distinct from the written one.

But supposing that we are mistaken, and that the testimony is competent, it may well be doubted whether it proves any contract, or is to be taken as an agreed condition between the agents of the plaintiff, and the defendant, that the road should run through Smithfield. The proof is, that one of the commissioners assured the defendant that the road should so run, and that he subscribed upon that assurance. Now, considering that one only of the three commissioners, who were required by the charter to take subscriptions at the town of Smithfield, made the assurance, the transaction has very much the appearance of its having been the mere confident expres-

sion of the opinion of the commissioner, that the road would so run, and that the defendant, confiding in that opinion, made his subscription accordingly. If such were the case, it was very clearly no contract to that effect between the parties. But whether that be so or not, it does not appear that Linn B. Saunders, or any other single commissioner, was authorised to make any such contract, or to stipulate for any such condition. The charter required that books for subscription should be opened at Smithfield, under the direction of John McLeod, Bythan Bryan, L. B. Saunders, Baldy Saunders, and Thaddeus W. Whiteley, or any three of them. If the commissioners thus appointed, or any three of them who acted, were authorised to make any such "assurances" as that, the benefit of which is claimed by the defendant, it is impossible to suppose that either one of them alone had such authority; for if any one of them had it, then each one of them might have had it; and thus, while one commissioner was assuring Mr. Leach that the road should pass through Smithfield, another might agree with Mr. A B that it should run by his farm, and the third might enter into a solemn contract with Mr. C D that it should pass right by the door of his mill-house; while the relative position of the town, the farm, and the mill, might be such as to make it greatly inconvenient, if not impracticable, to accommodate all. An authority to agents that could lead to such consequences, would never have been expressly given by a principal, and we, therefore, cannot construe it to have been given by implication. Our opinion, then, is, that the testimony offered by the defendant in support of the issue joined on his first plea, was incompetent; but if in that we are mistaken, and it is admissible, it does not sustain the defense set up under that plea. This makes it unnecessary for us to consider an additional objection made to it by the plaintiff; that if such a condition were annexed to the defendant's subscription, it was waived by his payment of five per cent on it at the time, and subsequently by his proxy assisting and voting in the meetings of the stockholders, which organised the company, without insisting on

the alleged condition. His main ground of defense, the defendant insists upon under his second plea. It is admitted that the eastern *terminus* of the plaintiffs' road was materially changed from the point designated in the charter, and the defendant contends that he was thereby released from the obligation to pay for the stock for which he had subscribed. The argument is, that the contract created by his subscription was that he would pay for the stock taken by him, if, or upon condition, that the road should be built according to the *termini*, and route prescribed in the charter, and, consequently, any material change, of either the *termini* or route, would be a failure on the part of the plaintiff, in the performance of a condition precedent, whereby he, the defendant, would be discharged from his part of the agreement. Or, in another view, it would be an attempt on the part of the plaintiffs' to hold him bound by a contract into which he never entered.

The question which the assumed defense raises is an important one, and we will now proceed to consider its validity.

It may be conceded, at least for the sake of the argument, that if the Legislature of a State, grant a charter for building a rail road, turnpike, or canal, between certain *termini*, and along a certain route, upon the faith of which subscribers take stock, and afterwards, without the consent, and against the will of one, or more of the subscribers, the Legislature passes another act, changing such *termini* or route, both or either, of the dissenting stockholders may refuse to pay for the stock for which they had subscribed. Such was the decision of the Supreme Court of Georgia, in the case of *Winter* v. *The Muscogee Rail Road Co.*, 11 Georgia Rep. 438, founded upon previous similar adjudications made in Massachusetts and New York. See *Middlesex Turnpike Co.*, v. *Locke*, 8 Mass. Rep. 268; *Same* v. *Swan*, 10 Mass. Rep. 385; *The Hartford and New Haven Rail Road Co.* v. *Croswell*, 5 Hill. New York Rep. 386. The principle of the decision is that the stockholder, when called on to pay his subscription for the building of such a road, without his consent, may truly say, "*non hæc in fœdera veni.*" Assuming then, this to be true,

an interesting question may arise, whether the principle will apply to a case where the alteration of the line of the road is made by the company, without the consent, and against the will, of the stockholder, and also without the sanction of any legislative amendment of the charter. In the latter case there is certainly not the same necessity for protecting the dissenting stockholder, by holding him released from the obligation of paying his subscription. It is clearly settled that he may avail himself of the writs of prohibition or mandamus, as his case may require, either to prevent the corporation from doing him an injury, or to compel it to yield him a right. Thus in *Blakemore* v. *Glamorganshire Canal Navigation*, 6 Eng. Con. ch. Rep. 544, Lord ELDON said, when the case was before him in one of its earlier stages, "I have, therefore, stated, and I have more than once acted on the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would, (unless the House of Lords were to correct me,) stop the further making of a canal which was in progress; and for this reason, that a man may have a great objection to a canal being made in one line, which he would not have to its being made in another, and particularly he might feel that objection in a case where parties, after obtaining leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A B, that the canal should come through the lands of C D, than through those of E F; but to that, my answer is, that you have bargained with the Legislature that you shall do the act they have authorised you to do, and no other act." We have adopted, and acted upon, at the present term, the principle thus laid down by one of England's greatest Chancellors, by enjoining the Greenville and Raleigh Plank Road Company, from establishing and running a line of stages against the wishes of some of the corporators; upon the ground that such an application of their funds was not authorised by their charter. *Wiswall* v. *Greenville and Raleigh Plank Road Co.*, 3rd Jones' Equity, (not yet reported.) *Mayor and Aldermen of Norwich* v. *The Norfolk Railway Co.*, 30 Eng. Law and Eq. Rep. 120, also sanctions the

doctrine that rail-way companies may be restrained by injunction from misapplying the funds of the company, (see the case at page 144.) The above are all cases of injunction, where rail-way, and other like companies, have been prevented, at the instance of persons interested, from doing wrong. The case of *Regina* v. *The York and North Midland Rail-way Co.*, 16 Eng. Law and Eq. Rep. 299, shows, that in a proper case, a party interested may compel, by mandamus, a rail-way company to complete a railway which it has begun. It is true, that the case, though decided upon great consideration by the Court of Queen's Bench with Lord CAMPBELL at its head, was reversed in the Court of Exchequer Chamber; but solely upon the ground that the words of the act of Parliament, upon which the question depended, were not, and could not be, construed to be compulsory upon the company. See the case in 18 Eng. Law and Eq. Rep 199; see also *Regina* v. *Great Western Rail-way Co.*, *ibid*, 364. If the principle thus seemingly established by the greatest force of authority be correct, we cannot perceive why it did not furnish the defendant with ample means for preventing the wrong and injury of which he complains. Why should the Courts interpose or protect him, (to the great detriment of the company, in depriving it of its funds,) by holding him discharged from his subscription, when he neglected to avail himself of a remedy plain and ample? We need not, however, answer this question. There is another objection to the defense, about which we do not entertain a doubt.

To make his defense available, it is certainly incumbent on the defendant to show that the alteration in the Eastern terminus of the road, was made without his concurrence and consent. Such seems to have been the opinion of the Court of Appeals of South Carolina, in the case of the *Greenville and Columbia Rail Road Co.* v. *Coleman*, 5 Rich. Rep. 118, where they say, at page 135, "It would appear reasonable to say that, if the corporation did acts to which a member did not object, either because he was supine, or because he would not attend when he might, and should have done so, it would not be

harsh to hold him estopped from disputing his acquiescence, especially when liabilities, duties and burthens, might accrue thereby upon the corporation." There is not a particle of proof—indeed, he has not alleged in his plea, that he ever made the slightest objection to the change; and the presumption is, in the absence of proof to the contrary, that he assented to it. He was, or might have been, present, either in person or by proxy, at the occasional meetings of the stockholders, (see *London City* v. *Venacker*, 1 Ld. Ray. 500,) and yet we never hear of his having raised his voice a single time against the alteration which he now alleges to be so great a grievance to him. We hold then, that the matter pleaded by the defendant in his second plea, and admitted upon the trial, furnishes no defense against the plaintiffs' action.

Having confined our attention to the merits of the case, as we understand it to be submitted to us by the agreement of the counsel on both sides, we do not discover any error in the judgment rendered in the Court below, and it must therefore be affirmed.

PER CURIAM. Judgment affirmed.

STATE *v.* WHIT, *a Slave*.

A smoke-house, opening into the yard of a dwelling-house, and used for its common and ordinary purposes, is, in law, a part of the dwelling, and in the breaking and entering of which a burglary may be committed.

There is no presumption of law arising from any fact, that a felonious breaking into a dwelling-house was committed in the night-time, rather than the day; and before a defendant can be convicted of burglary, that fact, must be proved, either directly or indirectly.

THIS was an indictment for BURGLARY, tried before ELLIS, Judge, at the Spring Term, 1857, of Chowan Superior Court.

Upon the trial, Doctor Charles Smallwood swore that he lived in Bertie county; that his smoke-house was about twen-

ty-four yards from his dwelling, which was his usual place of residence. The fence enclosing the house did not include the smoke-house, but all of this building was without the yard, except the front end, which formed a part of the yard fence; the door of the smoke-house opened into the yard; that the smoke-house was used for storing meat, and all the purposes for which such buildings are ordinarily applied; that about sun-rise, one morning, before the finding of the bill, he found the door of his smoke-house open, several pieces of meat missing, and the molasses running out of the cock of the barrel, a considerable quantity having already run out upon the floor.

It did not appear that there were any marks of violence about the door, or any other part of the house, nor did the witness say that the door had been locked the night before; nor even that the door had a lock upon it, nor were any of these questions asked by the solicitor, or the counsel for the defendant. A large watering pot was missing. It was in evidence that the defendant was a runaway slave when the smoke-house was found open; that he had been arrested a few months before the trial, when, in consequence of his resistance, much violence was used upon him. He was cut in several places, bled much, and suffered much pain. While in this situation, he was asked if he was not the boy that broke into Dr. Smallwood's smoke-house. To which he replied he was. He was asked by the same person what made him do it. His answer was, that he was bound to have something to eat. This conversation was held with the individual who captured the prisoner at his house, and he swore that he used no threats, or promises, to elicit the confession. Dr. Smallwood, who was in an adjoining room, was told that this was the boy that had broken open the smoke-house. He came into the room and asked the defendant if he did it; to which he replied, that "he did." He was asked then, if any one assisted him in breaking open the smoke-house; he said "not." He was asked, why he had not stopped the molasses barrel; to which he answered, "he thought he had done so." He

was asked, what he did with the watering pot; he said "he had thrown it into the river."

The defendant's counsel objected to the conviction:

1st. Because the house described was not a dwelling-house, within the meaning of the statute.

2nd. Because there was no sufficient evidence of a breaking.

3rd. It did not appear that Dr. Smallwood lived in the dwelling-house on the premises.

4th. The confessions were under duress and inadmissible.

Among other things, the Court charged the jury that they should receive the confessions of the prisoner with caution, having due respect to the situation in which he was when they were made; that if the confessions satisfied them that the prisoner broke into the smoke-house of the witness, as charged, in the night time, and stole therefrom a quantity of bacon, he would be guilty. That the smoke-house, as described, was such a building as the law contemplated in the use of the word dwelling-house.

Defendant's counsel excepted to the admissibility of prisoner's confessions, and to the charge.

There was a verdict of guilty. Judgment and appeal.

Attorney General, for the State.

No counsel appeared for the defendant in this Court.

NASH, C. J. The indictment is for a burglary committed in the dwelling-house of Charles Smallwood. Burglary is a felony at common law; and a burglar is defined by Lord COKE, 3rd Institute 63, to be "one that, in the night time, breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." To a conviction, it is necessery to prove: *first*, the breaking; *second*, the entering; *third*, that the house broken and entered, is a mansion-house; *fourth*, that the breaking and entering was in the night time; *fifth*, that the breaking and entering were with intent to commit a felony.

In all these particulars there must be proof satisfactory to the minds of the jury; and if the State fails upon any one point, the prisoner is entitled to an acquittal.

The house entered, in this case, was the smoke-house of Dr. Smallwood. The first question is, did the smoke-house, at the time of the entry and breaking, constitute a part of the mansion-house? Upon this point, the evidence of Dr. Smallwood is, that he lived in Bertie County; that his smoke-house was about twenty-four yards from his dwelling, which was the usual place of his residence; the fence enclosing the dwelling did not include the smoke-house, but all of this building was without the yard, except the front end, which formed a part of the yard fence, the door of the smoke-house opening into the yard; that he used the smoke-house for storing meat, and for all the purposes to which such buildings are ordinarily applied.

For the prisoner, it is insisted that the smoke-house, in this case, constituted no part of the mansion-house, as it stood twenty-four yards from it, and was not included within the same common fence. The dwelling-house, at common law, includes, not only the premises actually used as such, but also such out-buildings as were within the curtilage, or court-yard, surrounding the mansion-house. Roscoe's Crim. Ev. 348, 362. The smoke-house was a building used with the dwelling-house, and necessary to it in this country; and the only door it had, opened into the yard. In legal contemplation it was within the curtilage, as one side of it constituted a part of the common enclosure. This principle has been recognised in this State; the leading cases are those of the *State* v. *Twitty*, 1 Hay. 102; *State* v. *Wilson*, 1 Hay. 242; *State* v. *Langford*, 1 Dev. 253. The objection, then, that the smoke-house was not a part of the dwelling-house, cannot be sustained. It was within the curtilage, and used with the dwelling-house.

It is seen, that a part of the definition of burglary is, that the breaking and entering must be in the night time, and this must be proved by the State; for it is an essential allegation in the bill of indictment. There was no evidence to

show that this was the fact. Dr. Smallwood states that, about sun-rise, one morning, he found the door of the smoke-house open, and the articles specified, missing. The case does not state what white family he had, or where they slept that night. He further states, that he found the molasses still running out of the barrel on the floor. How much molasses was in the barrel the night before, or how much there was still in it—to what extent the floor was covered with it, we are not informed. If it had been set to running in the night, it probably would have ceased running before morning; and the fact that it was still running, rebuts the idea of its having been long in that situation, and is entirely consistent with the idea that it was set to running after day-light. On the part of the State, it was insisted that, as the prisoner was a runaway slave, it was more likely that it was done in the night, as he would be careful of showing himself in the day. This may be so, but from thence the law cannot presume the fact; and when the law does not presume the existence of a fact, there must be proof, direct or indirect, before the jury can rightfully presume it. 1 *Cobb* v. *Fogleman*, 1 Ire. Rep. 440; *State* v. *Revels*, Bus. Rep. 200. Here, there is neither direct, nor indirect proof that the entry was in the night. No proof whatever to ascertain that fact. The inference drawn by the State, from the fact that the prisoner was a runaway slave, might well apply, if the question was whether he had committed the act, but has no bearing whatever in fixing the time.

PER CURIAM. There is error, and must be a *venire de novo.*

STATE *v.* DAVID, *a Slave.*

Where a female slave was in the act of resisting the rightful authority of her master, another slave, her husband, who approached with the intention of violently aiding the resisting slave, heedless of the consequences, and did give such aid as made it necessary for the master to turn his force upon him, by which he was exposed to a fatal blow from the principal, such interfering slave, as well as the principal, is guilty of murder.

State *v.* David.

There is no analogy to be drawn between cases where a free person is on trial for homicide, and a slave for slaying his master.

The proper rule of practice is, for the party having the right to conclude, to open the argument. The opposite party then replies, and the former again replies in the way of conclusion.

INDICTMENT for MURDER, tried before his Honor, Judge MANLY, at the Spring Term, 1857, of Pitt Superior Court.

The charge in the bill was, that a female slave, Fanny, feloniously assaulted and killed one Abner F. Griffin, and that the prisoner and another slave, Mack, were present, aiding in the homicide.

The deceased had been employed by the owner of these slaves as an overseer, on a plantation in Pitt County, and the accused slaves, and divers others, were in his charge, and had been, for about two months.

Franklin Bell, a witness for the State, stated, that on the evening of the homicide, he and his father visited the plantation where the deceased superintended, and got there about dark. On approaching the house, he saw a negro boy riding off a horse, and mentioned it to the deceased, who went out to enquire concerning it. He was referred by one of the slaves to the house of Fanny and David, for information. Getting a light, he proceeded to the house where David and his wife, Fanny, lived, and called upon him to know where the horse was. Fanny, who had followed David out of the house, answered, that she had sent him off. Upon further enquiry, she said she had sent after an old woman. Deceased told her she ought to have asked him about it; to which she replied, that her master had permitted her to do so, and she intended to do it, as long as there was a horse on the plantation. The deceased said he suspected it was a jug of liquor she had sent for; to which she replied, "it was a very big jug, and he would see when it came." The deceased said he had a great mind to whip her for her impudence; she said he would not whip her that night. The deceased then took a rope out of his pocket, and told her to cross her hands.

She said she would not. Deceased said if she did not, he would knock her down. She still refused, when he struck her with a stick, which he had in his hand. She threw up her arms and received the blow upon them. David, who was standing about twelve feet off, then advanced and said, "you ain't got to do so," or "you must not do so here." The witness did not see that he raised his arms. As he approached, the deceased turned from Fanny, and struck David a blow on the head with his stick, which brought him nearly, or quite, to the ground. About the time the deceased struck David, Fanny struck him on the head with a pine-knot, or stick of light-wood, which knocked him down. After the deceased fell, the boy, Mack, who had been standing at the door of the cabin, out of which the three had come, came forward with an axe, and said, "clear the way." The witness got over the fence to where the parties were—drew a pistol, and told Mack to go back into the house, or he would shoot him, whereupon he did go back into the house. Witness then turned to the others; the deceased was still down on the ground, and David had one knee on the ground, as if in the act of rising; his right hand was on the handle of a maul, and his other upon something which witness did not describe. Deceased had no other weapon than the stick already mentioned.

Another witness for the State, *Mr. Baker*, stated substantially the same things.

Violet, a slave belonging to the same plantation, testified that she heard the prisoner, Fanny, say, some short time before the homicide, that if the overseer tried to whip her she would fight him.

The prisoner offered no evidence, and his counsel claimed the conclusion. The Attorney General conceded his right to conclude, but insisted on his opening the case, and stating the grounds of his defense. This was objected to by defendant's counsel, but the Court ruled the point against him, and he opened the argument, as well as concluded it. Defendant excepted to this ruling of the Court.

The defendant's counsel contended:

1st. That according to the testimony, David was not guilty.

2nd. That to convict David, the State must show a common purpose between Fanny and David, and that the blow was stricken in pursuance of that purpose.

3rd. That if the blow was not preconcerted, but was given by Fanny upon a sudden impulse, and David was not cognizant of her intention to strike, he would not be guilty.

4th. That if all the parties had been free, Fanny would be guilty of manslaughter only, and David would not be guilty at all.

The Court charged the jury, "that the law of slavery is absolute authority on the part of the owner, unconditional submission on the part of the slave. The master may punish his slave at will, and the manner and degree must, in general, be left to his own judgment and sense of humanity, with the restriction that he cannot kill.

The overseer, to whom the master delegates the management of a plantation, and as incidental thereto, the conduct of the slaves, would be in the place of the owner, and in the absence of any restriction of his power, he would occupy precisely the same relations of privilege and responsibility. "Applying these principles to the transaction before us, I am of the opinion the overseer had full power to punish the woman for her insubordination and impudence; and resistance to his rightful privilege was rebellion in her. If, in making such resistance, she struck a blow with a deadly weapon, (a stick calculated to do great bodily harm,) it was a case of murder."

"Such is the law in respect to the principal actor in the commission of this homicide. The rule with respect to the principals in the second degree, is that, all persons who are present at the commission of the crime, aiding and abetting its commission, are guilty also.

"An intention to kill is not necessarily involved in a criminal homicide. A purpose to assist another with violence, and under circumstances that must necessarily result in death, or

some great bodily hurt, is sufficient to characterise a killing, thus occurring, as murder.

"If, therefore, David, when he approached the deceased, intended to assist the woman in resisting him, and to do so by violence, if needful, reckless of the consequences, he also would be guilty of the blow struck by the woman in the prosecution of the purpose, and will be guilty of murder.

"But if no such purpose was entertained by David, at the time he advanced upon the deceased; if, in other words, he was not present as an aider and abettor, he would not be guilty."

"A common purpose or intent was requisite, but it was not necessary that the purpose or intent should be preconceived for any particular length of time; it is sufficient if it had been formed, and was entertained and acted on at the time of the fatal blow."

The defendant's counsel excepted to this charge.

The jury found Fanny and David guilty of murder, and Mack not guilty. Judgment and appeal by David.

Attorney General, for the State.
Rodman, for defendant.

PEARSON, J. We fully concur in the instructions given by his Honor. The threat of Fanny, a short time before, to *fight* the overseer, if he attempted to whip her—the relation of the parties, and their conduct at the time of the homicide—was evidence tending to show a preconceived purpose on their part to resist the overseer, if he should attempt to whip Fanny. The jury having negatived this fact by the acquittal of Mack, we are to assume that there was no such preconceived common purpose. But in respect to the prisoner, David, we are to assume from the verdict that he approached the deceased with an intention to assist Fanny in her resistance, and to *do it by violence, if need be, reckless of the consequences.*

We are of opinion that this intention, accompanied by the *overt act* of advancing upon the deceased, although formed at the instant, and not preconceived, brings upon the prisoner

the guilt of murder. Resistance to the master is a species of petit treason, and the mind of a slave who commits it, must be wrought up to desperation, and "fatally bent on mischief." The master not only has the right, but it is his duty, to overcome it at all hazzards. The slave knows this, and the spirit of insubordination that raises an arm in resistance, must be reckless of the consequences. If, in this state of things, another slave advances with an intention to take part, and aid in such resistance, he is alike desperate, and fatally bent on mischief. If the prisoner had caught the deceased by the arms, and held him, while the woman struck the fatal blow, his guilt could not be questioned. His interference produced the same result. By his approach it was made necessary for the deceased to turn and strike him. Thus the deceased was put off of his guard, and exposed to the blow. The accident that the prisoner was knocked down and disabled at the outset, can in no wise relieve him of the consequences of his unlawful act.

It is unnecessary to say how far the prisoner's guilt would have been mitigated, had the deceased been in the act of inflicting upon the woman any grievous or cruel injury, because there was no evidence that such was the case; on the contrary, the deceased was doing no more than what he ought to have done much sooner.

Unconditional submission on the part of slaves must be exacted. If, while one is in the act of resistance, another may come up and give aid, without involving himself in the guilt, the consequences would be awful.

His Honor very properly refused to permit any analogy to be drawn from the law in regard to free persons. It could furnish none in reference to the guilt of slaves where life is taken in the act of resistance to the master.

We agree with his Honor in regard to the rule of practice which he enforced, and to which the prisoner's counsel excepts. As the prisoner offered no evidence, he was entitled to the conclusion, but it was proper that his counsel should be required to state the grounds upon which a conviction was resisted,

in order to give the counsel for the State an opportunity of replying to it. Common fairness suggests that this is the proper course. Otherwise the State would be taken wholly at a disadvantage, and the prisoner's counsel might suggest views of the case, and draw inferences from the evidence, which would go to the jury unanswered, unless the presiding Judge should feel himself called upon to notice them. This would be objectionable. The proper rule is, that the party having a right to conclude, opens the argument; the opposite party then has an opportunity to reply, and he, in his turn, may reply, by way of conclusion. There is no error.

PER CURIAM. Judgment affirmed.

WILLIAM H. MAYO *v.* JESSE GARDNER.

An agreement, the consideration of which is the compromise, or arbitration of a right which is doubtful, or supposed by the parties to be doubtful, is valid.

THIS was an action of ASSUMPSIT, tried before MANLY, Judge, at the Spring Term, 1857, of Edgecombe Superior Court.

The plaintiff declared, 1st, upon an oral warranty of the merchantable character of certain turpentine bought from the defendant.

2ndly. Upon a failure to perform an award.

The plaintiff proved that, in August, 1854, he bought of the defendant seventy-four barrels of turpentine for $248; that the same was present at the landing when the trade was made, and it was agreed that plaintiff should take the turpentine as it was, without inspection. The most of the price was paid down, and the remainder before April, 1855. During the interval between August and April, the turpentine was permitted to remain where it was, but the barrels being of inferior quality, a good deal of it ran out upon the ground,

which was scraped up by the plaintiff's directions and restored to the barrels. In the Spring of 1855, after full payment of the price had been made, it was agreed, by the parties, that the turpentine should be inspected by one Grimmer, and what he condemned for dirt, plaintiff should pay nothing for. It was accordingly inspected in the presence of the parties, and twenty-seven barrels condemned for dirt. The witness Grimmer, who proved this, stated that he understood from the conversation of the parties, that the turpentine had been sold as "dip." The whole, he said, was at that time inferior, not worth more than one-third of a good article. He stated that merchantable *dip* was worth $3,28.

The plaintiff contended that he was entitled to recover the whole of the twenty-seven barrels, or a proportionate part of the sum paid.

The Court was of opinion that the plaintiff was not entitled to recover at all. In deference to which suggestion, the plaintiff submitted to a nonsuit, and appealed.

Rodman, for plaintiff.
Dortch, for defendant.

Nash, C. J. There is error. The Court below was of opinion that the plaintiff could not recover, upon the ground, we suppose, (for no reason is assigned,) that there was no consideration for the new implied promise on the part of the defendant. The original contract was at an end, but in consequence of the insufficiency of the barrels, a considerable quantity of the turpentine ran out, which by the direction of the plaintiff was scraped up, and restored to the barrels. It was then agreed between the parties, that a Mr. Grimmer should inspect the turpentine, and what he condemned for dirt plaintiff should pay nothing for. It was accordingly inspected in the presence of the parties, and it was adjudged by Grimmer that the twenty-seven barrels were not worth any thing. This is the substance of what he stated. We are not passing upon the original contract, but our attention is directed solely

as to the question as to the existence of a new consideration for the new promise.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a submission of claims and demands to arbitration is binding, so far as this, that the mutual promises are a consideration, each for the other. 1 Parsons on contracts, 364. Com. Dig. "Action on the case on Assumpsit," A 1, B 2. In *Keson* v. *Barclay*, 2 Penn. Rep. 531, an action of slander for words, was compromised by the defendants agreeing to pay the plaintiff a sum certain; the Court held there was a sufficient consideration, though the words used were not slanderous. *In re Lucy*, 21 Eng. Law and Eq. Rep. 199, it was decided that, to sustain a compromise, it was sufficient, if the parties thought, at the time of entering into it, that there was a *bona fide* question between them, though, in fact, there was no such question.

Now, in this case, Mr. Grimmer, the referee, stated that, at the time he inspected the turpentine, none of it was good. The plaintiff, no doubt, thought he was entitled to compensation from the defendant to the value of the whole of the twenty-seven barrels, or a proportionate part of the sum paid by him for the whole. The defendant, on his part, thought he had a good defence to the whole claim. In this situation they agree, in order to avoid a law-suit, that Mr. Grimmer shall inspect the turpentine, and what he condemned for dirt, the plaintiff should pay nothing for. But the plaintiff had already paid the whole price to the defendant. The meaning of the parties, therefore, must have been, that the defendant would pay to the plaintiff the value of the terpentine condemned by Grimmer. After this agreement, the plaintiff could not have maintained an action on the warranty, or of deceit.

Per Curiam. Judgment reversed.

A. W. SILVERTHORN *v.* SAMUEL R. FOWLE.

Where a contract is so obscurely worded that the Court cannot tell what its meaning is, it is error to leave it to a jury to pass on its meaning, but the Court should tell them it could not be recovered on.

Where some of the terms, in which a contract is expressed, are words of science, or art, which require the evidence of experts to explain them, the jury, of necessity, must pass upon the meaning of those words but being ascertained by them, the duty of the Court is, still, to give a construction to the contract.

Where there are not such terms, the construction is entirely with the Court.

ACTION of ASSUMPSIT, tried before his Honor, Judge MANLY, at the Spring Term, 1857, of Hyde Superior Court.

The plaintiff declared on a special contract made with the defendant, that the latter was to "take a raft of timber at $7,50 per thousand, which was to be prepared by the plaintiff in Germanton Bay, and thence towed by the defendant's steamer to the town of Washington, and that *it was to be ready when corn was done.*" The contract was made in the month of March. It was proved that, in June, that is, before the cultivation of the then growing crop was finished, the plaintiff called for the timber, but it was not ready. It was further proved, that about the 1st of July, as soon as the growing crop was *laid by*, the raft was ready in the place designated. The defendant contended that the meaning of the contract was, that the raft was to be delivered and taken, when the planting of corn was finished. The plaintiff, on the other hand, insisted that the true meaning of the bargain was, that it was to be delivered and received as soon as the working of the crop was done.

His Honor left the sense of the contract to the jury, upon the words and other evidence, as a *question of fact*, and instructed them, if they found the plaintiff had the raft ready, at the time and place he contracted to have it ready, and gave notice to the defendant, who refused, or neglected, to take it, plaintiff would be entitled to recover damages. If plaintiff had not complied with the terms of his contract, i. e., if the

raft was not ready in time, according to the proper interpretation of the agreement, the plaintiff would not be entitled. The defendant excepted to this charge.

Verdict for the plaintiff. Judgment and appeal by defendant.

Donnell, for plaintiff.
Rodman and *Sparrow*, for the defendant.

NASH, C. J. It is certainly true, that the construction of a contract, whether verbal or written, is a matter of law, to be decided by the Court. Where, however, technical, or unusual words, are used, and their meaning is to be gathered from experts, or persons acquainted with the particular art to which these words refer, or from authoritive definitions, as there may be conflicting evidence, it may present a question for the jury. 2 Parsons on Contracts, 5. But where a contract presents such a case as may require the aid of a jury, the duty of the jury is to ascertain the meaning of the terms used, but it is still the duty of the Court to decide the meaning of the contract. *Hutchison* v. *Banker*, 5 Mee. and Wells. Rep. 535. And if a contract is so worded that no definite meaning can be attached to it, it is the duty of the Court so to instruct the jury. The Court is no more at liberty to guess what was the meaning of the parties, than is the jury. In this case, the jury ought to have been instructed, that the contract is so obscurely worded that it could not form the basis of judicial action. It is utterly impossible, from the terms used, to say when the lumber was to be delivered. The word "done" has no specific meaning, except in cookery. Bread is said to be done, and meat, done, when they are sufficiently cooked for use as food. But when is corn done? The lumber was to be delivered "when corn was done." "Done" is not a word of art or trade, and requires no expert to tell us its meaning. The Court left the sense of the contract to the jury upon the words, and other evidence, as a matter of fact. We have seen that, in a proper case for a

jury, they pass only upon the meaning, or sense of the words used, the duty of expounding the contract still being the duty of the Court. But the jury were no more competent to put a construction upon the word "done," in the connection in which it stands, than the Court was. Used as it is in this contract, it is senseless, and not susceptible of explanation. We may guess at its meaning, but neither a Court or jury are permitted to decide controversies by guessing, and no man can guess, to his own satisfaction, what the word here means.

PER CURIAM. Judgment reversed, and a *venire de novo*.

JOSEPH T. JOICE *v.* LEWIS B. BOHANAN.

It was agreed between A and B that, if the former would sell the latter's land for more than $1500, he might have all he could get over that sum. A sold it on a credit for $1800, and bonds were taken, payable to B for the whole sum, which B accepted, and gave a bond to make title; *Held*, that A was not entitled to his compensation, until the money became due, and was collected, or might have been.

ACTION OF ASSUMPSIT, tried before SAUNDERS, J., at the Spring Term, 1857, of Stokes Superior Court.

It appeared that, in September, 1854, the plaintiff and defendant, by parol, agreed that, if the plaintiff would sell defendant's land, that the plaintiff should have all he could *get* for it over $1500; that after this contract was made, the plaintiff sold the land for $1800, and in the same month (September) plaintiff, defendant, and Vernon, the purchaser met, when the defendant received in cash from Vernon, some two or three hundred dollars, and took his notes for the remainder of the eighteen hundred dollars, and gave Vernon a bond to make title when the purchase-money was paid. After this was done, plaintiff requested defendant to give him his note

for his three hundred dollars; to which defendant replied, "his word was as good as his bond."

Vernon was solvent, but it did not appear whether or not the notes were due at the commencement of the action.

Defendant insisted that the plaintiff was not entitled to recover on this state of facts, and prayed his Honor so to instruct the jury. A verdict was taken for the plaintiff, subject to the opinion of the Court, with leave to set it aside, and enter a nonsuit, if his Honor should be of opinion against the plaintiff.

Afterwards the Court ordered a nonsuit, and plaintiff appealed.

McLean and *Miller*, for plaintiff.
Morehead, for defendant.

Pearson, J. We concur with his Honor that the plaintiff commenced his action too soon. Had the matter rested upon inference, we would have been of opinion that the plaintiff, according to the agreement, was to sell for cash, and by way of compensation for his trouble, and in lieu of commissions, was to have all he got over $1500; that is, the defendant was, in the first place, to have $1500 in cash, in consideration for his land, and the plaintiff was then to have any excess he might be able to obtain.

By giving a long credit without interest, the plaintiff could, no doubt, have found a purchaser at $2000, or even a larger sum; and so the defendant, if he was held down to $1500, when the credit was out, would lose interest and the profits of the land, and the consideration received by him be, in fact, less than $1500.

It appears from the evidence, that the plaintiff sold, in part, for cash, and the balance on time, to be secured by the notes of the purchaser, and the title to be retained. In this, the defendant acquiesced. He received a part in cash, took the notes of the purchaser, and executed a bond to make title when the purchase-money was paid. The point is, at what

time, according to the intention of the parties, did the plaintiff's right to demand the compensation agreed on, accrue? It is against reason to suppose that the defendant was bound to pay the plaintiff's compensation *out of his own pocket*, and wait for the price which he was to have for his land, until the sale-notes became due. This, to use a familiar expression, is "putting the cart before the horse." The primary object was to enable the defendant to effect a sale of his land, and get the money for it. The plaintiff's compensation was secondary—an incident that was to follow. The plaintiff did not *get* for the defendant $1500, by procuring the notes of the purchaser on time, no matter how solvent he was. He had no right to demand anything for his services until the defendant received the price, or had a right to receive it. So, his cause of action will not accrue until the sale notes fall due, and the defendant receives the money, or has a reasonable time to collect it and is guilty of laches.

The expression used by the defendant that "his word was as good as his bond," amounts to nothing. The meaning is, that his word was as good as his bond, for anything he was bound to do, but that he did not think he was bound to pay the plaintiff before he got the money himself; and in that, we concur with him.

The case referred to by the defendant's counsel—*Bull* v. *Price*, 7 Bing. Rep. 237, (20 Eng. Com. Law Rep.) is in point. *Bull* undertook to negotiate with the commissioners of woods, for the sale of Price's interest in certain premises, and was to attend to the business in reference to the valuation, &c., and was to have *two per cent* on all he *obtained* by private treaty, arbitration, or trial by jury, for his trouble and exertions. The value was ultimately fixed by a jury at £4000, but it turned out that the property was charged with an annuity of £80 a year. In consequence of a difficulty in settling this matter, the payment of the £4000 was postponed, and the commissioners paid the money into bank, where the parties entitled to it could get it by application to the Court of Exchequer. Bull commenced his action before Price had received the

money, and it was decided that he began too soon. The Court say, he was entitled to commissions, not on the sum which may be agreed on, or awarded, or ascertained by a jury, but on the sum which may be *obtained* by the defendant, and that Bull must wait until Price "actually obtained, that is, *received it*," or, at least, until the amount that he ought to receive, was ascertained.

So, we say, the plaintiff must wait until the price, agreed to be paid, falls due.

PER CURIAM. Judgment affirmed.

DAMERON H. PUGH *v.* OLIVER W. NEAL.

The words for which an action of slander was brought were, "that the plaintiff had sworn falsely, in a trial before a justice of the peace, as to an account in his favor against the defendant;" *Held*, that the plaintiff was not bound to show that the justice of the peace, before whom that trial was had, was duly commissioned.

THIS was an action on the CASE for SLANDER, tried before BAILEY, J., at the Spring Term, 1857, of Hyde Superior Court.

The charge was, that the defendant said that the plaintiff had sworn falsely, in a trial before a justice of the peace, to an account in favor of himself against the defendant.

It was in evidence that a judgment was rendered against the defendant, on the oath of the plaintiff, by one Joseph C. Tunnell, who was, at the time, sitting for the trial of causes, and acting as a justice. During the trial, Tunnell was spoken of as the justice before whom the warrant was tried, but there was no evidence that he was commissioned as such, nor that he acted generally in that capacity.

The defendant's counsel, in the argument of the cause, objected to the sufficiency of the proof, as to Tunnell's being a

justice of the peace, and asked his Honor to charge that it was insufficient.

His Honor declined so to charge, but told the jury if Joseph C. Tunnell was, at the time, sitting for the trial of causes, and acting as a justice of the peace, administering oaths, and doing other acts pertaining to the office, there was no necessity for showing that he was commissioned. Defendant excepted.

Verdict and judgment for the plaintiff. Appeal by defendant.

No counsel for plaintiff.

Sparrow, for defendant.

NASH, C. J. The slanderous words used by the defendant, on which the action is brought, are as follows: That the plaintiff had sworn falsely, in a trial before a justice of the peace. It was in evidence that, a judgment had been obtained before a man named Tunnell, against the defendant, on the oath of the plaintiff. The pleas were, the "general issue" and "justification." There was no evidence that Tunnel was a justice of the peace, further than his acting as such on that occasion.

The defendant objected that there was no evidence that Tunnell was a legally authorised magistrate, regularly commissioned, and asked the Court so to instruct the jury, which was refused.

Under the plea of not guilty, the sufficiency of the words to sustain the action, necessarily arises. Do the words by the defendant here, amount to the charge of perjury?

Perjury is said, by Lord COKE, to be committed when a lawful oath is administered in some judicial proceeding, to a person who swears falsely, &c., in a matter material to the issue, or point, in question; 3 Ins. 164. In this case, the charge made by the defendant is, that the plaintiff had sworn falsely, in a trial before a justice of the peace. This, then, is a distinct charge of perjury, standing in need of no *colloquium* to make the meaning clear; as much so, as if the word perjury had been used. The words charge the taking of a false oath, before a justice of the peace on a trial. We judicially

know, that justices of the peace are judges to try causes litigated before them, with power to swear witnesses, and that, when engagad in the trial of a cause, they constitute a Court of justice. The words, then, used by the defendant, amounted to a direct charge of perjury; of course, it was not at all necessary to prove that Mr. Tunnell was a regularly commissioned justice. If the charge had been that the false oath was taken on a trial, before Joseph C. Tunnell, it would have been necessary for the plaintiff to prove that Tunnell was a regularly commissioned justice; or that he was in the habit of acting as such, and discharging the duties of the office. The law prescribes no particular form of words to be used in making a slanderous charge. If the words or actions used are such as to convey to the minds of the hearers the intent of the defendant to slander the plaintiff in that particular, it is sufficient; *Studdard* v. *Linville*, 3 Hawk's Rep. 474; and the words are to be taken in their ordinary acceptation among those in whose presence they are uttered. *Hamilton* v. *Smith*, 2 Dev. and Bat. Rep. 274.

PER CURIAM. Judgment affirmed.

SOLOMAN LOUDER *and Wife* v. WILLIAM B. HINSON.

Where one occasion sought, under color of process, to wreak his vengeance on an individual and his family, by harrassing and insulting them, the jury were properly instructed that they might give vindictive damages.

THIS was an ACTION of TRESPASS, A. B., tried before CALDWELL, Judge, at the Fall Term, 1856, of Cabarrus Superior Court.

The plaintiff's declared for an assault and battery upon the wife.

Hinson, a constable, having process against Monroe Louder, a son of the defendant, and another, for a breach of the peace,

came in the night-time, with one Long, who is also a defendant, and two others, to the house of the plaintiff, at a late hour of the night, after the family had gone to bed, and enquired for the son. He was answered by the father that the boy had gone to bed, and he did not wish him disturbed that night, and offered to be surety for his appearance next day, at any place he would appoint. The defendant, Hinson, with an oath, said, that he would make the arrest that night. Hinson and Long then got into a scuffle with the plaintiff, and one of them pulled his hair. Hinson then come to the fireplace where the youth, Monroe Louder, was standing, and tapping him on the shoulder, said, that he arrested him, and that he was his prisoner. The plaintiffs both, then told the party that they had got what they wanted, and to leave the house, which they refused to do, but indulged in offensive and profane language towards the plaintiffs, and wanton conduct towards their property. One of the party, Long, rushed at the male plaintiff with a shovel, and was prevented from striking him by the son, Monroe, but pushed him back on the bed. The female plaintiff, who was lying in bed, reached up and got a gun, which was above her, when the defendant, Hinson, seized it, took it away from her, and struck her with it violently, leaving marks of violence on her head and ear for several days afterwards. After this, the said Hinson and his associates, remained in the house, and about it, for nearly a quarter of an hour longer, making insulting and derogatory remarks towards the plaintiffs; after which they went off with their prisoner.

His Honor charged the jury that, if they believed, from the testimony, that the parties sought the occasion, under process, to wreak their vengeance on the Louder family, by harrassing and insulting them, it would be a case where they might give vindictive damages. Defendant excepted to this charge.

Verdict for the plaintiffs, and several damages against the defendants. Judgment rendered. Hinson only appealed to this Court.

Jones, for plaintiff.

No counsel appeared for defendant in this Court.

NASH, C. J. The action is trespass for an assault and battery upon the female plaintiff. In his charge, his Honor instructed the jury, that if they believed, from the testimony, that the parties sought the occasion, under color of process, to wreak their vengeance on the Louder family—to harrass and insult them, that it would be a case where they were allowed to give vindictive damages for the battery upon the feme plaintiff, if one had been committed. This charge is in exact conformity to the opinion expressed by the Judge below, before whom the case of *Causee* v. *Anders*, 3 Dev. and Bat. 246. In that opinion, the jury were instructed "that the plaintiff had a right to expect a full compensation in damages for the injury really sustained, &c., but in addition to this, the jury were sometimes called on to increase the amount of damages, by adding on something by the way of punishment, where it appeared the defendant was actuated by malice, and a total disregard of the laws, and the plaintiff was in no wise to blame." This opinion was adopted by the Supreme Court, almost in so many words.

This is a case for vindictive damages, and the charge here was within the spirit of that referred to.

PER CURIAM. There is no error, and the judgment is affirmed.

Doe on demise of JAMES ATWELL *et. al. v.* JAMES McLURE.

The general principle, in an action of ejectment, is, that the plaintiff must prove the defendant in possession of the premises sued for, notwithstanding the confession of "lease entry and ouster" in the "common rule."

The principle of the rule is to prevent surprise on the party who makes himself a defendant.

But where a person was served with a copy of the declaration after leaving the premises, and entered into the common rule, and contested the matter upon the validity of the title deeds, there being no question as to the identity of the land, he shall not be heard to say he was not in possession when the declaration was served on him.

The beginning of an action of ejectment is the serving of the declaration.

ACTION of EJECTMENT, tried before DICK, Judge, at the Spring Term, 1857, of Mecklenburg Superior Court.

The def't. entered into the common rule and pleaded not guilty.

The declaration in this case bore date, and was filled up by the plaintiff's counsel on the 7th day of December, but was not placed in the hands of the sheriff until several days thereafter, and was not served on the defendant until the month of March following, *he then being off of the land.*

On the said 7th of December, the defendant, some time during the fore part, or about the middle of the same, moved out of the premises, and during the same day, with his team and wagon, moved one Saunders into the same, where he remained as the defendant's tenant, until after the return day of this suit, when he attorned to the plaintiff, and was accepted by him as tenant.

The cause went to the jury upon the question whether a certain deed, made by Alexander McLure, was valid; the Court reserving the question of law arising on the above facts, with an understanding that he might enter the judgment which his decision of the point required.

The jury found a verdict for the plaintiff on the title.

Afterwards, on consideration, the defendant insisting that he had not been proved in possession, his Honor ordered a nonsuit according to the agreement, and the plaintiff appealed.

Boyden and *Bärringer*, for plaintiff.
Osborne and *Jones*, for defendant.

PEARSON, J. We concur with his Honor upon the first point. The commencement of an action of ejectment is the time when the declaration is served; in other actions, it is the time when the writ is issued. This is settled, and the reason

of the distinction explained in *Thompson* v. *Red*, 2 Jones' Rep. 412.

A copy of the declaration was served on the defendant, with a note from his "loving friend, Richard Roe," saying: "I am informed you are in possession of, *or claim title to*, the premises, &c." He entered his appearance to the action, and by leave of the Court, had himself made defendant, entered his plea, and went to trial on the question of title. Both parties claimed under one Alexander McLure, and the question turned upon the *bona fides* of a deed, alleged to have been executed by said McLure to the lessor of the plaintiff. There was no question as to the identity of the land sued for, and a verdict was for the plaintiff upon the merits.

It would be a strange result if, after all this, the defendant is entitled to a judgment, on the ground that, although he claimed title to the land, yet he was not in possession when the action commenced. It would be a mockery of justice to allow the defendant, after fighting the case upon its merits, and losing it, to turn around and say, if the verdict had gone in my favor, I would have been entitled to a judgment, and I am equally entitled to a judgment, notwithstanding the verdict has gone against me. So, I was safe anyhow, and had a chance to gain the case upon the merits! Yet this is contended for, and was so held by the presiding Judge, under the rule as laid down in *Albertson* v. *Redding*, 2 Murph. Rep. 283; S. C. 1 Car. Law Repos. 274. "In ejectment, the plaintiff is bound to prove the defendant in possession of the premises, which he seeks to recover."

We fully approve of, and feel bound by this, as a general rule. But in order to fix the extent of its application, and determine the exceptions to its operation, it is necessary to examine into the "reason" upon which it is based.

The action of ejectment is, in form, "trespass." The judgment is, that the plaintiff "recover his damages and costs." The order for a writ of possession is no part of the judgment. No one is compelled to become a defendant. A copy of the declaration is served to give notice of the action, and to ena-

ble the person, if he is concerned in the matter, either because he is in possession, or because he claims title to the land, to apply and have himself made defendant. The object of the fiction of a "casual ejector" is to put it in the power of the Court to *refuse to allow* any one to be made a defendant, unless he will enter into the common or special rule. In this, it differs from all other actions. In detinue, the defendant is compelled to appear by *mesne process*, and the judgment is, that the plaintiff recover *the specific thing*. For these reasons it is necessary for the plaintiff to prove that the defendant had the article in his possession at the time the action was commenced. These reasons, as we have seen, do not apply to the action of ejectment; consequently, the general rule above referred to, in respect to that action, must be based on some other ground.

If no one applies to defend the action, the plaintiff cannot take judgment by default, against the casual ejector, unless he proves that the person upon whom a copy of the declaration was served, was in possession; for, without this, no case is constituted in Court, and if a judgment was rendered against the casual ejector, A would be turned out of possession without notice, or an opportunity to be heard, simply by serving a copy on B, who is a stranger, and has no concern with the land. This branch of the rule is, therefore, founded upon a universal principle of justice, and admits of no exceptions.

If any one applies to defend the action, and is permitted to make himself a party defendant for that purpose, the other branch of the rule is called into action, and it is based, as we shall see, upon particular principles, and, consequently, admits of many exceptions.

Suppose the declaration is for twenty acres of meadow, and twenty acres of pasture, situate in the parishes of Over Stowey, and Nether Stowey, in the County of Somerset; the party who is made defendant proves title to two pieces of land, answering that general description; but the plaintiff proves title to two other pieces of land, answering the same general description; the defendant shall have judgment, un-

less the plaintiff proves that he (the defendant) was in possession of one, or both, of the latter two pieces, to which the plaintiff had proved title; and although it be said the defendant ought to have disclaimed in regard to the two pieces of land claimed by the plaintiff, the reply is, how could he tell what land the plaintiff sued for? If he had not defended the action, he might have been turned out of possession of his own two pieces of land. This was the point in the famous case of *Goodright* v. *Rich*, 7 Term Rep. 327, where the branch of the general rule now under consideration, is established. That rule is based on a particular reason—to prevent surprise on a party who makes himself defendant. The Chief Justice (KENYON) says, in that case, "when the declaration is delivered, the lessor claims, in general terms, so many acres of land, which communicates but little intelligence to the person served with the copy. If the latter happen to be in possession of any land falling within the description in the declaration, he must defend, in order to preserve his own right. Then it would be unjust that a verdict should be found against him, although he can prove title to every acre of land, in the parishes, of which he was ever in possession; and yet this is the consequence of the plaintiff's argument."

Or suppose the declaration is for a tract of land setting out the metes and boundaries. The party upon whom the declaration is served, makes himself defendant. On the trial, it turns out that the defendant has title to so much of this tract as he is in possession of; the plaintiff has title to the remainder; but the defendant never was in possession of that part; the defendant is entitled to a judgment; because the plaintiff has failed to prove that he was in possession of any land to which he had title. This was the point in *Albertson* v. *Redding*, *supra*, where the English rule is adopted by a majority of the Court; although TAYLOR, C. J., dissents on the ground that, as our declarations are more specific in the description, the reasons for the English rule do not apply, and he prefers to require defendants to enter a disclaimer. But the general rule has, ever since, been considered settled, as laid down by

the majority of the Court. HENDERSON, J., in delivering the opinion of the Court, puts it on this reason: "If the defendant's possession does not interfere with the plaintiff's claim, the mischief (that is the costs) should be borne by the plaintiff, who has *misled the defendant*, rather than by the defendant, who has trusted to the plaintiff's assertion; otherwise the defendant whould be compelled to decide, at his own peril, whether the lands described are those possessed by him; although he is told so by the plaintiff, and this too, when the plaintiff describes by artificial boundaries, the beginning and the extent of which, may be entirely unknown to the defendant."

So, the principle of the rule is to prevent surprise on the party who makes himself a defendant; and the exceptions are, that when there is no surprise, and the parties go to trial on the question of title, there being no difficulty as to the identity of the land, and both plaintiff and defendant setting up claim to the whole of it, if the verdict goes against the defendant, it is not for him to say that he was not in possession at the time the action was commenced. It is sufficient, *so far as he is concerned*, that he claimed title to the land, and made himself a defendant for the purpose of asserting it. Accordingly in *Mordecai* v. *Oliver*, 3 Hawks' 479, it was ruled in the Court below, that under the circumstances of that case, it was not necessary that there should be an actual possession by the defendant, to maintain the action; "that if the defendant claimed to be in possession, *or claimed the lands in controversy, and entered himself a defendant, with a view of maintaining such claim*, that was sufficient to enable the plaintiff to maintain the action." The ruling was approved in this Court, and the case of *Albertson* v. *Redding* was referred to, as fixing the general rule; but the case under consideration was held to be an exception. We will remark in passing, that the form of the notice set out by Blackstone in the appendix to the 3rd book, is, "you are in possession of, or claim title to," &c. So in *Gorham* v. *Brenon*, 2 Dev. Rep. 174, the defendant had never been in possession, but he came in and

defended the title and possession of one Brenon, and there was judgment for the plaintiff, making that case also an exception. So in *Wise* v. *Wheeler*, 6 Ire. Rep. 196. The defendant had never been in possession, and never made an admission in regard to the possession, but he had himself made defendant, and succeeded in showing title, and there was judgment, but there was no intimation that the plaintiff would not have been entitled to judgment had he succeeded in the question of title; in fact, this is assumed by the direction given to the case. So in *McDowell* v. *Love*, 8 Ire Rep. 502, the defendant never was in possession, but he procured himself to be made defendant, upon an affidavit setting out "that the premises in dispute were his," and that Chambers went into possession as his tenant; the declaration had been served on Chambers, and Love was made defendant on this affidavit. The principle contest was as to a part of the land covered by the defendant's grant, but the plaintiff insisted that he was entitled, at all events, to a judgment in respect to a small slip of land not covered by the defendant's grant, on the ground that, by coming in to defend as landlord, he admitted himself to be in possession, and no evidence was necessary. The Court below held otherwise, applying the general rule. In this Court that judgment was reversed, on the ground that "the affidavit supplied proof of the tenant's possession of all the land within the boundaries described in the declaration;" and the case fell within the exception. In *Carson* v. *Burnett*, 1 Dev. and Bat. Rep, 546, the declaration described several tracts. The defendant having succeeded in showing title to all the parts of which his tenant was in possession, the plaintiff attempted to secure a verdict by proving title to a part covered by the declaration, but of which the tenant had never been in possession; it was held he could not be allowed to do so, "for it would be a *surprise* if the defendant were called on to defend for portions of the land of which his tenant never had possession," although they were set out in the declaration; and the general rule was, for that reason, applied to the case.

These are all the cases in the reports on the subject. They fix the general rule, that the plaintiff must show the defendant in possession, on the principle of preventing surprise, and the exceptions are plainly deducible therefrom.

Our case falls under the exceptions. There is no pretence of surprise. The defendant claimed the land in controversy, and entered himself a defendant, with a view of maintaining such claim. There was no difficulty in regard to the identity of the land, and the case is stronger, because he had, a very short time before the declaration was served, put one Saunders in possession as his tenant. If a copy had been served on Saunders, the defendant, as landlord, might have come in and defended. It can make no difference, so far as he is concerned, that the declaration was served on him. He availed himself of the opportunity of trying the question of title, under the same advantages, as if the declaration had been served on his tenant. Having done so, he can, with no show of justice, insist, not only that it should all pass for nothing, but that he should have judgment for his costs. As to Saunders, when the plaintiff asked for a writ of possession, (but for his attornment,) he might have opposed the issuing of the writ, or had it superceded upon motion of *audita querela*. The order for the writ of possession is no part of the judgment, but is now, in most instances, granted as of course, unless there be special grounds for not allowing it. It was ordered in analogy to the writ of *habere facias seisinam* in a real, or mixed action, to prevent the necessity of the termor's resorting to a Court of Equity. It would be refused, unless there was proof that a copy of the declaration had been served on the tenant, even although the landlord, as in our case, had come in and made himself defendant, in order to try the title, and there was judgment against him.

Per Curiam. The judgment of nonsuit set aside, and judgment for the plaintiff on the verdict.

WILLIAM H. WESSON *v.* THE SEABOARD AND ROANOKE RAIL ROAD COMPANY.

A master is not liable for the wilful trespass of his servant.

This was an action of trespass, q. c. f., tried before Manly, J., at the Spring Term, 1857, of Halifax Superior Court.

The defendants had, under the authority of an Act of the Assembly, proceeded to lay off a rail road from Weldon to Gaston, and had let out the construction of the same to certain contractors who were occupied during the year 1852, in grading the road bed. While so working, the contractors above mentioned committed the trespass complained of. The President of the Seaboard and Roanoake Rail Road Company, gave a general superintendence to the work, but there is no evidence that he sanctioned, or even knew of the trespasses in question.

There was a verdict taken by consent of the parties, with leave to set it aside and order a nonsuit, if his Honor, upon consideration, should be of opinion that the plaintiff could not sustain the action.

The Court afterwards ordered a nonsuit, from which the plaintiff appealed.

No counsel appeared for the plaintiff.
B. F. Moore, for defendant.

Pearson, J. There is no error. A master is not liable for the wilful trespass of a servant. He is liable in an "action on the case" for an injury, caused by the negligence, or unskilfulness, of a servant, while doing his business. This is an action of trespass *vi et armis*. "There was no evidence that the master sanctioned, or even knew of the trespass in question."

Per Curiam. Judgment affirmed.

JOHN C. WASHINGTON *v.* JAMES A. VINSON.

The words "executed P. R. T., D. Sheriff," endorsed on a *capias*, which, duly issued, and came to the hands of the sheriff, are so much a due and legal return, as to make the sheriff liable as special bail, on the failure of him, or his deputy, to take a bail bond.

THIS was a SCIRE FACIAS, tried before MANLY, J., at the Spring Term, 1857, of Johnston Superior Court.

It was issued for the purpose of subjecting the defendant as special bail of Wm. G. Parish, Matthew Boykin, and Augustus Parish, against whom a judgment was rendered in the County Court of Johnston.

It appeared that the original action was begun some time in the year 1854, and that the writ issuing thereon came to the hands of the sheriff, who, in that year, placed the same in the hands of P. R. Tomlinson, a deputy of the said sheriff. The latter returned the said writ with this endorsement: "Executed, P. R. Tomlinson, D. Sheriff."

The only point in the case was, whether that was such a due and legal return as to make the principal sheriff liable as special bail, no bail bonds having been taken from the defendants in the writ.

His Honor being of opinion with the plaintiff upon this point, gave judgment for him, and the defendant appealed.

Fowle and *Husted*, for plaintiff.
G. W. Haywood and *Lewis*, for the defendant.

NASH, C. J. The defendant is sheriff of Johnston County, and received a writ issued in the name of the present plaintiff, against certain individuals. This precept was by him placed in the hands of his deputy, P. R. Tomlinson, who executed it, but failed to take any bail bond from the defendants. The return on the writ was "executed by P. R. Tomlinson, D. S." The *sci. fa.* is to subject the defendant as special bail. The defendant relies on the plea of *nul tiel record*. Under this

plea, our attention is confined to the judgment set out in the *sci fa.* The *sci. fa.* states that the writ in the original suit came duly to the hands of James Vinson, who was sheriff, &c., and that the said James Vinson, by virtue of the said writ, did, by his deputy, Parker R. Tomlinson, duly appointed, &c., take the bodies, &c. The defendant insists that, from the return endorsed on the writ, it appears that it was not executed by him, but by P. R. Tomlinson, D. S. Two cases upon this point have been brought to our notice. One from 1st Hay. Rep. 208, (Judge Battle's edition,) *McMurphy* v. *Campbell*, and the other from 2nd Car. Law Rep., p. 440, *Holding* v. *Holding*. In each, the plea of *nul tiel record* was relied on. They were each against persons who had been subpœnaed to attend Court as witnesses in favor of the plaintiffs, in suits then pending; in each the return was made by individuals signing their proper names with the affix of the letters "D. S." The Court, in each case, recognises the person making the return as the deputy sheriff, but the objection was to the form of the return, which was precisely as in this case. These decisions are, no doubt, right, as applied to those cases. They do not, however, govern this. The defendants, in those cases, were those persons who were at liberty to controvert the return, even if made by the sheriff himself. In the former, the judgment was against the defendant, upon the ground that it was proved that the person making the return was the deputy; and in the latter, for the defendant, because there was no proof of that fact. In our case, the defendant, is the sheriff who cannot be heard to disavow the official act of his deputy.

Tomlinson, it is admitted, was the defendant's deputy; as such, it was within his power to execute the writ in the original suit, and it was his duty to have taken the bail bonds as required by law. For this misfeasance, the sheriff is answerable to the plaintiff. Against the deputy, no action could have been sustained by the plaintiff. His remedy is against the sheriff, the principal. There is no error.

Per Curiam. Judgment affirmed.

SIMEON WARBRITTON *v.* RICHARD A. SAVAGE.

If one joint-owner of a crop sells to the other his share of it to pay a debt, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner's removing the property, though forbidden by the other.

ACTION of TRESPASS, *vi et armis*, tried before MANLY, J., at the Spring Term, 1857, of Edgecombe Superior Court.

The declaration was, for forcibly taking away a quantity of cotton.

One *Kellibrew*, a witness for the plaintiff, stated that, in the fall of the year, 1855, the defendant came to him, and requested him to go and divide a crop between him and the plaintiff. He went, and one *Worsely* divided the corn, fodder and cotton, each into two equal parts, the plaintiff and defendant both being present.

One *Manning* swore that he was present when the division was made; that, in the presence of the plaintiff, after the cotton was divided, the defendant gave instructions to the witness, who was in his employment, to carry all the cotton away, and he did so. The plaintiff made no objection at first, but after some of the cotton had been put into a cart, he claimed the cotton, and forbid the taking away of the part allotted to him. He stated further that defendant leased the land on which the crop was made from John Ruffin, and agreed that the plaintiff should cultivate the land, the defendant furnishing a horse, and food for one horse during the year 1855, and that the crop should be divided equally.

Worsely proved that plaintiff forbade the defendant from taking away the cotton, and threatened him with a law-suit if he did so.

The defendant produced several witnesses, who stated that, in the summer and fall of 1855, prior to the division of the crop, the plaintiff in conversation with them, said that he was indebted to the defendant, and that the latter was to have the whole of the crop, until the debt he owed defendant was satisfied. The

plaintiff, in conversation with one of the witnesses, stated, that he owed the defendant for seven barrels of corn, at $4 per barrel. Other witnesses proved that plaintiff owed defendant for provisions furnished that year, previously to the division, and that the amount of plaintiff's indebtedness was greater than the value of the cotton. One witness testified that, while the division was going on, he asked the plaintiff for the payment of a judgment which he held on him, to which he replied, he could not get his money then, for it would take all he had, to pay the defendant the debt which he owed him.

The plaintiff contended that, by the division, the title to the cotton vested in him, and that he was, by that division, put in possession of it.

The defendant insisted that it was not the intention of the parties, by the division, that plaintiff should be put in possession of the cotton, but merely to ascertain the amount of the plaintiff's share, so that he might receive credit for the value of it on the defendant's account, and that plaintiff had no such possession as would enable him to maintain the action.

The Court instructed the jury that a division and allotment of the cotton into two parcels, under the circumstances stated by the witness Killebrew, imported a purpose, in the absence of proof to the contrary, of giving and vesting in each party, what belonged to him. Whether there was proof to the contrary, was submitted to the jury as a question of fact. If it was divided with a view to give each party what belonged to him, this action might be sustained, unless there was, after the division, an agreement on the part of the plaintiff, that his share of the cotton should go in payment of the defendant's debt, or stand as a pledge for it. Defendant excepted to the charge.

Verdict for the plaintiff. Judgment and appeal.

Dortch, for plaintiff.
Rodman, for defendant.

Battle, J. In one part of his Honor's instructions to the jury, we do not concur. He told them that if the cotton "was divided with a view to give each party what belonged to him, this action might be sustained, unless there was, after the division, an agreement on the part of the plaintiff, that his share of the cotton should go in payment of the debt due the defendant, or stand as a pledge for that debt." Now, it seems to us, that the law applicable to the contract was the same, whether the agreement was *before* or *after* the division, if it were the intention of the parties, as was contended by the defendant, that the division should be made merely to ascertain the amount of the plaintiff's share, so that he might receive credit for the value of it on his account with the defendant. The testimony admitted of that construction, and if the jury should believe that such was the intention of the parties, we are not aware of any principle of law to prevent its being effectuated. The plaintiff had an undoubted right to sell his undivided share of the cotton to the defendant, either for cash, or in payment of a former debt; and then it would belong to the defendant as soon as it was set apart and ascertained by a division. We cannot distinguish this case, in principle, from that of a sale of a part only of a large quantity of goods, when such part cannot be ascertained without weighing, or measuring, or other act of separating, or distinguishing it from the rest. There, the purchaser cannot obtain a title to the goods until his portion has been set apart; but it is clear that his title would accrue, in consequence of the previous agreement, the moment it was set apart; *Morgan* v. *Perkins*, 1 Jones' Rep. 171. The cases cited and relied upon by the plaintiff's counsel, are not at all opposed to this view; *Ross* v. *Swearingen*, 9 Ire. Rep. 481, proves only, that where a lease is made, the rent to be paid in a part of the crop, the contract is executory, and the title to the crop is in the lessee, until the lessor's part is separated and allotted to him, and that, therefore, before that time, the lessor has no right to take possession of any part of the crop, without the consent of the lessee. But can it be doubted that the effect of the contract of lease

will give the lessor a title to the part allotted to him, the moment the division is made? There could be no necessity for a new agreement *after* the division. The case of *Brazier* v. *Ansley*, 11 Ire. Rep, 12, instead of militating against, rather confirms, our position. The Court say, "in a case like this, which, in principle, is similar to that of a sale of a lesser part out of a larger, the appropriation by the landlord was incomplete, until ratified by the cropper, or his agent and vendee, the plaintiff. It would be manifestly unjust to suffer the landlord to be sole judge of the rights of the cropper. Not only was the assent of the plaintiff withheld, but he positively refused to receive the corn set apart from him, or his principal." Would the result have been the same, had the cropper assisted in the division? Would it have required a new agreement made between him and his landlord, to vest in him the title to his share? We certainly think that his assent to take would have been implied, and that the moment his portion was separated from that of the landlord, it would have become, to all intents and purposes, his property. In *Hare v. Pearson*, 4 Ire. Rep. 76, a case not referred to by the counsel, it was decided that, where one crops, or works with the owner of land for a share of the crop, and, after it is made, the crop is divided, the share of the cropper is liable to be sold, though it was levied on before the division, and though it still remains in the crib of the owner of the land. The Court said, "admit that Powell was the servant and cropper of the defendant, at the time the growing corn was levied on by the officer, as his property, (which then, in fact, was not his, but belonged to the defendant,) still, at the day of sale, the title to the corn actually sold, was in Powell, by the division previously made with the defendant." Now, if the division made it his, so as to render it liable to sale on a previous levy, we cannot see any reason why a contract of sale made previous to the division, should not make it his, so as to pass instantaneously to the purchaser. In neither case can there be any necessity for an agreement to be made *after* the division to vest the title in him, in order to render it liable to the prior

levy of an execution, or to the operation of an antecedent contract of sale. For the error in the particular mentioned, the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Doe on the demise of H. M. GILES *v.* J. M. PALMER.

A sale of land under, and by virtue of, a judgment and execution, transfers, at law, all the estate, rights and interest, of the defendant, in the execution, even the legal estate which he holds as trustee.

THIS was an ACTION of EJECTMENT, tried before SAUNDERS, J., at the Spring Term, 1857, of Orange Superior Court.

J. M. Palmer made a deed of trust of the property in question to N. J. Palmer, trustee, dated 21st of March, 1853, to secure various creditors therein mentioned, upon conditions and provisions which, the plaintiff contended below, were fraudulent and void as against creditors. This property was sold by the trustee, and bought by Henry Lutterloh at a full price, who conveyed the same to the defendant, as the trustee of his wife.

While Palmer was thus seized, the property in question was levied upon and sold, by virtue of an execution in favor of Foley and Woodside against him, and the plaintiff purchased it at auction, and took the sheriff's deed for the same.

There were various important questions growing out of the validity of the instrument, but the Court perceiving that there was error in the charge of his Honor, upon the general right of the plaintiff to recover, independently of these questions, therefore, declined to hear them discussed.

Judgment below was rendered *pro forma* for the defendant, on the case agreed. Plaintiff appealed.

Bailey and *Fowle*, for plaintiff.
Graham, for defendant.

NASH, C. J. The defence offered in this action, cannot avail the defendant here. The defendant holds the land in question as trustee for his wife; as such the legal title is in him. The lessor of the plaintiff is the purchaser of the land at a sheriff's sale, under an execution against the defendant. A purchaser at a sheriff's sale succeeds to all the rights of the defendant in the execution; that is, acquires the interest the latter had, whatever that may be, in the state it was in at the time the execution was levied. *Rutherford* v. *Green*, 2 Ire. Eq. 121. The defendant, in the execution, cannot deny the purchaser's right to stand in his shoes. Should the plaintiff, in this case, attempt to deprive the trustee of the possession of the premises, the remedy of the *cestui que trust* will be in a Court of Equity.

There is error in the judgment below, and, by consent of the defendant, judgment is rendered for the plaintiff.

PER CURIAM. Judgment reversed.

REDMOND R. DUPREE *v.* ELIZABETH DUPREE AND ABRAM MOYE.

The purchase of a particular estate in land by a reversioner, is no evidence tending to show that a claim for damages, which the purchaser had, on account of waste theretofore committed, was settled in that purchase.

It is no objection to an action on the case in the nature of waste, that the reversioner purchased the estate of the particular tenant, after the waste was committed.

TRESPASS on the CASE in the nature of waste, tried before MANLY, J., at the Spring Term, 1857, of Edgecombe Superior Court.

The land in question was devised by Willis Dupree to the plaintiff and James Dupree, in fee, and the latter assigned his estate to the plaintiff before the commission of the alleged waste. The defendant, Elizabeth, was the widow of the said

Willis, and, having dissented from her husband's will, the lands in question were assigned to her for dower, in November, 1849.

It was proved that the defendant, Abram, in 1854, cultivated the premises jointly with the other defendant, and with her assent, in the Spring of that year, cut down the trees in a portion of the grove around the dwelling, and cultivated it in cotton. He also cleaned up the yard back of the dwelling-house, and took off the top dirt, so as to make holes at places.

Defendants relied on the plea of accord and satisfaction, and, to sustain it, they offered proof tending to show that, in 1853, the estate of the dowress was worth $2000, and they showed a treaty for the sale of her right, and produced a deed dated in November, 1854, showing a consideration paid by plaintiff to defendant, Elizabeth, of $1750, and a conveyance of her estate to him for that sum.

The defendants' counsel contended that, plaintiff having purchased the estate of the dowress, after the alleged waste was committed, this action could not be sustained.

His Honor ruled that there was no evidence to sustain the plea of accord and satisfaction. To which defendant excepted. He was further of opinion that his right of action was not taken away by the purchase of the dower interest, after the waste was committed. Defendant further excepted.

Verdict for plaintiff. Judgment and appeal.

B. F. Moore, for plaintiff,
Rodman, for defendant.

Battle, J. The defendants objected to the plaintiff's recovery, upon two grounds:

1st. Because of an accord and satisfaction.

2ndly. Because the plaintiff had purchased the life-estate of the defendant, Elizabeth Dupree, before the commencement of his action.

We are of opinion that there was no evidence to support the first objection, and that, in law, the second is not tenable.

1. The only testimony offered to prove the accord and satisfaction, was the treaty between the parties for the purchase of the defendant, Elizabeth's, life estate, and the deed by which it was conveyed to the plaintiff, upon the payment of the price by him. We are unable to perceive any such necessary, or even probable, connection between that transaction, and the adjustment of the damages which the plaintiff had a right to claim for the injury done to the land by the defendants, as to make the one a settlement and compensation for the other. In all the cases cited and relied upon by the counsel for the defendant, where one thing is presumed from another, the presumption is founded upon the principle that the one is ordinarily the consequence of the other.

Thus, as it is common in England for the purchaser of goods to give his note for the price, a note given after the purchase of goods is, in the absence of direct proof, presumed to have included the price of such goods. *Motrie* v. *Harris*, 1 Moody and Malkin, 322. So, an order for money is not usually left in the hands of the drawee, unless the money has been paid. Hence the possession of the order is admitted as evidence of the payment. *Blount* v. *Starkey*, Tay. Rep. 110. So, of all the other cases where such presumptions have been allowed; and they can never be safely admitted, unless observation and experience have shown that, in the large majority of instances, certain facts have caused, or been followed by certain results. Can it be shown from observation and experience that the purchase of a particular estate in land by a reversioner, or remainderman, usually embraces an adjustment of the claim for damages which the purchaser may have against the vendor? Is it so in the analogous case of a purchase by a remainderman of a life-estate in slaves, or other personal property? It may, perhaps, be said, and said truly, that such instances are too rare for the production of any such cases. If so, it will be rather hazardous to lay down any rule of presumption on the subject. The fact might be so, or it might not be so. It is a mere matter of conjecture, and conjecture is no proof in favor of him who is boundto make proof. *Sutton* v. *Madre*, 2

Jones' Rep. 320. We, therefore, agree with his Honor that there was no evidence given in support of the plea of accord and satisfaction.

2. The second objection is founded upon the idea that there must exist a particular estate, and a reversion at the time when the action is brought, as well as when the waste was committed. In support of this, the counsel for the defendants relies upon the authority of Co. Lit. 35 b., where it is said: "Note, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the waste, he granteth it over, though he taketh back the whole estate again, yet is the waste dispunishable; so if he grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone." The counsel referred also to the case of *Bacon* v. *Smith*, 41 Eng. Com. Law Rep. 571, where PATTESON, Judge, in remarking upon this passage, said "it had immediate reference to the old form of action, but the rule equally applies to an action on the case in the nature of waste." It is unnecessary for us to enquire whether if the plaintiff, in the present case, had granted away his reversion, he could have maintained his action. If he could not, it would not be for the want of privity, simply because privity is not now necessary to the action on the case in the nature of waste. Instead of being confined, as the old action of waste was, to the owner of the inheritance against his immediate tenant for life, or years, it may be brought by a person in remainder or reversion for life, or years, as well as in fee, or in tail, and against a stranger as well as against a tenant. 2 Saund. Rep. 252, note 7; *Williams* v. *Lanier*, Busb. Rep. 30; *Dozier* v. *Gregory*, 1 Jones' Rep. 100. It may be brought also in the tenuit against a tenant, after the term for life, or years, has expired. *Kinlyside* v. *Thornton*, 2 Black. Rep. 1111. Privity, then, not being essential to the maintenance

of the action, we are not aware of any principle which forbids a suit by a remainderman or reversioner after the purchase by him of a particular estate, for waste done before.

The counsel contends that the right to damages is an incident to the tenure, and that when the plaintiff has, by his own act, put an end to the tenure, the incident must be extinguished with it. But we have seen that the right to damages for the waste does not depend on the tenure, and, of course, the inference that it must cease with it, cannot be legitimately drawn.

There is no error in the judgment, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Doe on the demise of LUCIAN N. BRUCE *et. al v.* THOMAS FAUCETT.

Where a deed of bargain and sale, reciting its object to be to secure the premises to the sole and separate use of the bargainor's daughter, and a consideration of one dollar, moving from the bargainee, conveyed the same to the said bargainee and his heirs in trust, for the sole, separate and exclusive use of the said daughter and her heirs, on the death of the daughter, leaving children, her heirs-at-law; *Held*, that the said heirs-at-law could not maintain an action of ejectment; and the legal estate still remained in the trustee.

THIS was an ACTION of EJECTMENT, tried before SAUNDERS, J., at the Spring Term, 1857, of Orange Superior Court.

The lessors of the plaintiff showed that they and the defendant claimed under John A. Faucett, and produced a deed for the premises in question, being a part of lot no. 122, in the town of Hillsborough, from him to Henry Faucett, his father, dated 1st of July, 1830, and a deed from Henry Faucett back to John A. Faucett, dated 4th of July, 1831, conveying the same premises to him in fee, for the sole, separate and exclusive use of Harriet Bruce, the wife of George W. Bruce, and the daughter of the said Henry, and her heirs, forever, excluding all right and interest of the husband, which was also ex-

ecuted by the said G. W. Bruce, the husband. They then proved that Harriet Bruce died in 1842, and that they are her children and heirs-at-law; the eldest of whom attained to his majority a few days before the date of the demise alleged in the declaration.

The defendant contended that, at the instance and request of Mrs. Bruce, lot 122 was, on the 24th of February, 1834, exchanged for lots 89 and 90, in the said town of Hillsborough, which belonged to John A. Faucett, and that a deed was, on that day, executed by John A. Faucett, G. W. Bruce, and Harriet Bruce, to Thomas Faucett, conveying the said lot, (no. 122,) to the said Thomas, stripped of the trust, who again conveyed to John A. Faucett, and a deed was, at the same time, executed by John A. Faucett to Thomas Faucett, for lots nos. 89 and 90, who reconveyed the same to John A. Faucett in trust, for the sole and separate use of Harriet Bruce and her heirs, forever.

The defendant further showed, that on the 18th of February, 1846, John A. Faucett conveyed lot no. 122 to Joseph Allison in trust, for the payment of debts, and, on the 29th of Nov., 1849, he sold the same to the defendant.

All these deeds were in fee simple, but Harriet Bruce was not privily examined as to her execution of the deed in 1834, which was proved and registered after her death, only as to John A. Faucett.

It was shown that possession had been, agreeably to these conveyances, ever since they were made, and that George W. Bruce, the husband of Harriet Bruce, had survived her, and was still living.

A verdict was taken for the plaintiff, by consent, subject to be set aside, and a nonsuit entered, in case the Court should be of opinion that the action could not be sustained.

His Honor, according to the agreement, afterwards set aside the verdict, and ordered a nonsuit. Plaintiff appealed.

Graham and *Bailey*, for plaintiff.
Norwood, for defendant.

Battle, J. The construction put by his Honor upon the deed under which the lessors of the plaintiff claim, is correct. It did not pass the legal estate to the heirs-at-law of Mrs. Bruce, and of course they cannot maintain their action of ejectment. The deed is one of bargain and sale, which operates to convey the title by the force and effect of the statute of uses, 27th Hen. 8th, (sec. 1 Rev. Stat., ch. 43, sec. 4; Rev. Code, ch. 43, sec. 6.) As a deed of bargain and sale, it is governed, in this State by the same principles which were applied to it in England. It must have a pecuniary, or other valuable consideration. *Blount* v. *Blount*, 2 Car. Law Rep. 587; *Brocket* v. *Foscue*, 1 Hawks' Rep. 64. Though in form, a deed of bargain and sale, yet if the only consideration is that of love and affection, it will operate as a covenant to stand seized. *Slade* v. *Smith*, 1 Hay. Rep. 248; *Hatch* v. *Thompson*, 3 Dev. Rep. 411; *Cobb* v. *Hines*, Busb. Rep. 343. If no consideration, either good or valuable, appear on the face of the instrument, or can be proved *aliunde*, it will be void. *Springs* v. *Hanks*, 5 Ire. Rep. 30; *Jackson* v. *Haughton*, 8 Ire. Rep. 457. In the late case of *Smith* v. *Smith*, 1 Jones' Rep. 135, other incidents, which attached to deeds of bargain and sale in England, were held to apply to them in this State. Thus, the Court say "it is settled that, a future contingent use to one unknown, or not in esse, cannot be raised by a deed of bargain and sale. It is also settled that a use cannot be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger."

All these cases have been referred to for the purpose of showing that the same principles apply to deeds operating under the statute of uses here, as they do to deeds operating under the same statute in England. There is still another rule which applies to a deed of bargain and sale in England, which we have not yet noticed. It is, that if a use be declared on the legal estate in the hands of the bargainee, the statute will not execute it, upon the ground that it will not

execute a use upon a use. 2 Black. Com. 355. Thus, if A, by a deed of bargain and sale, sold land to B, to the use of C, though a valuable consideration may have passed from both B and C, the statute would execute the first use only, leaving a trust in favor of C, which could be enforced nowhere but in a Court of Chancery. On the absence of any adjudicated case to the contrary, we do not feel at liberty to withhold the application of the same doctrine here. Indeed, from the repeated recognition, by our courts, of the principles which prevail in England in relation to this kind of conveyance, we feel bound to apply it. The consequence is, that we must hold that the legal title to the lot of land in question is still outstanding in the hands of the bargainee (the trustee) or his *alienee*, and the lessors of the plaintiff having a trust only, can have relief only in a Court of Equity.

PER CURIAM. Judgment affirmed.

WILLIAM HAWS, *to the use of* JESSE THOMPSON, *v.* JOHN CRAGIE.

The presumption of payment, arising from the lapse of time, applicable to a bond executed in another State, is that allowed by our law, and not that which prevailed in the State where the bond was executed.

ACTION of DEBT, tried before his Honor, Judge SAUNDERS, at the Spring Term, 1857, of Alamance Superior Court.

The plaintiff declared on a bond executed by the defendant in the State of Virginia, more than ten years before the bringing of this suit, and less than twenty years.

There was no evidence to prove that the presumption, arising from the lapse of ten years, was rebutted, and the defendant insisted that the plea of payment was sustained, and asked his Honor so to instruct the jury.

The plaintiff contended that there was a presumption; that the presumption of payment arising under the common law,

was the rule to govern the case, as that was presumed to be the law prevailing in Virginia when the bond was executed.

His Honor being of the latter opinion, so instructed the jury, who found a verdict for the plaintiff; and judgment being rendered accordingly, the defendant appealed, upon exceptions to the charge of the Court.

Hill and *Bailey*, for plaintiff.
Graham and *Long*, for defendant.

Battle, J. The question involved in this case is, whether the common law presumption of payment, which is assumed to prevail in Virginia, where the bond was executed, or that of this State, in which the action has been brought, shall form the rule of decision. In other words, it is a question between the *lex loci contractus* and the *lex fori;* and, in our opinion, the weight of authority is decidedly in favor of the latter. It is admitted that, " in regard to the merits and rights involved in actions, the law of the place where they originated, is to govern; but that all forms of remedies and judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act." Story's Conf. of Laws, sec. 558. So, that the true enquiry is, whether the time which raises the presumption of the payment of the bond, regards the rights and merits of the action, or is involved in the form of the remedy, and judicial proceedings which have been instituted for the recovery of the debt. Now, it cannot be disputed that the forms of process, and the rules of pleading, appertain to the remedy, and that with regard to them, the *lex fori* must prevail.

The plaintiff's counsel virtually admits this by not objecting to the plea of payment; for it is well known that, at common law, a bond being under seal, could not be discharged, except by an instrument of as high a nature, to wit, a release under seal. Hence, the plea of payment was not allowed to an action of debt on a bond, until the statute of 4th Anne,

ch. 16, sec. 12, authorised its use. If then, the common law is in force in Virginia, unaffected by the statute of Anne, and our rules of pleading had to be governed by it, the plea of payment would have to be rejected, for which nobody contends. As we have a right to apply our own rules of pleading to an action brought here upon a foreign contract, we think it clear that we must decide upon the merits of the controversy by our own rules of evidence. The mischiefs of a contrary doctrine are obvious; for if we were to admit evidence according to the *lex loci contractus*, "one of our citizens might," as was forcibly said by the defendant's counsel, "be affected by the testimony of negroes, or other persons, whom it is the settled policy of our law to reject as witnesses." It cannot be denied that, when lapse of time is used as a defence against a bond, it is upon the ground of its being evidence of payment. After a long period, the law recognising the difficulty of procuring direct testimony, allows the party to resort to, and avail himself of, presumptive evidence; and unless it be rebutted by counter evidence, it may have all the weight of the most positive proof. Defences founded upon presumptions being thus liable to be met and repelled by counter proofs, are not so strong as statutes of limitation, which bar the remedy, and sometimes the right, after certain periods. And yet we find that all these are regarded as affecting the "forms of remedies and judicial proceedings." Thus, Mr. Justice Story, in his Conflict of Laws, section 576, says, "In regard to statutes of limitation, or prescription, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they be brought by subjects, or by foreigners. And there can be no reason, and no sound policy, in allowing higher or more extensive privileges to foreigners, than to subjects." Again, in section 577, he says: "It has accordingly become a formulary in international jurisprudence, that all suits must be

brought within the period prescribed by the local law, (*lex fori*,) otherwise the suit will be barred; and this rule is equally as well recognised in foreign jurisprudence, as it is in the common law. Not, indeed, that there are no diversities of opinion upon this subject; but the doctrine is established by a decisive current of well considered authorities." These principles are founded in justice, as well as convenience, and our Courts will always be found ready to adopt, and give effect to them. Thus, in the case of *Watson* v. *Orr*, 3 Dev. Rep. 161, the Court said, that "the law of the country where a contract is made, is the rule by which the validity of it, its exposition, and consequences, are to be determined." But if a suit be brought upon it in the Courts of this State, any defence which the defendant may be able to make, must, as we think, be availed of, according to our rules of pleading, and be established according to our rules of evidence. The same principles will be found to prevail in the jurisprudence of our sister States. At least the diligent research of the counsel for the plaintiff has failed to bring to our attention a case in which a different doctrine has been the rule of decision. The case of *Horton* v. *Horner*, cited from the 16th Ohio Rep. 145, has a head-note which seems to make it an exception. The note is, that "a contract made in the State of New York, for the payment of money in that State, the maker residing there at the time of its execution, is controlled by the laws, and affected by the statute of limitations of that State." In looking into the opinion of the Court, we find that the decision was founded upon a statute of the State of Ohio, (cited as section 4th of the statute, Swan 555,) which declared that all actions founded on a contract between parties *residing without this State at the time such contract was made*, and which are barred by the laws of such State, shall be barred when brought in this State." The case, then, furnishes a strong implication that, but for the statute of Ohio, which gave effect to the New York statute of limitations, it would have been governed by the ordinary statute of limitations of Ohio, and

is thus an authority against the argument which it was intended to support.

There is a class of cases, the doctrine of which may, by some persons, be supposed to be at variance with that which we suppose to have been settled by the arguments and authorities which we have produced. It is, where personal property is adversely held in a State, for a period beyond that prescribed by the laws of that State, and after that period has elapsed, the possessor removes into another State, which has a larger period of limitations, or is without any statute of limitations, and it has been held that the title of the possessor cannot be impugned in the latter State. See *Shelby* v. *Guy*, 11 Wheat. Rep. 361. It is manifest that there is a marked distinction between the effect of a statute which gives a right, and one which merely bars a remedy. It may be the duty of every State, upon the principle of comity, to protect a right or title, no matter how acquired, under the laws of another State, whether by the direct and immediate effect of a contract, or an act, or by an act coupled with long possession; but a very different question is presented when the rules of pleading, and evidence of the *lex fori*, are involved. These rules are so various and minute in different countries, that it would be utterly impracticable for the judicial officers of any one country or State, to ascertain them, and use them as the means of decision. Its own rules of pleading and evidence, the Judges may, by long study and practice, learn and apply, with some hope of doing justice to the suitors, and by these rules alone ought they to be governed.

Our conclusion, then, is, that his Honor erred in holding that the presumption of payment did not arise upon the lapse of more than ten years after the cause of action accrued on the bond in question, as prescribed in our statute of 1826, (Revised Code, ch. 65, sec. 18.) For this error the judgment must be reversed, and a *venire de novo* awarded.

Per Curiam. Judgment reversed.

TURNER BYNUM *v.* D. H. ROGERS *et al.*

A negotiable instrument made for the purpose of being sold in the market, at the best price, endorsed by the payee in furtherance of that purpose, and sold for cash, by the agent of the maker, at a greater discount than six per cent. per annum, is usurious.

DEBT on a BOND, tried before SAUNDERS, Judge, at the Spring Term, 1857, of Chatham Superior Court.

Pleas "general issue" and "usury."

The subscribing witness having proved the execution of the bond declared on, stated that the obligor, Murchison, requested him to take it to the defendant Rogers, to whom it was made payable, and get him to endorse it, and then to dispose of it on the best terms he could; that the defendant Murchison, had a considerable amount of money to raise by Chatham Court, then to come on in a few weeks, and that this bond was made for the purpose of borrowing money for that object; that after it was endorsed by Rogers, witness took the bond, and meeting with the plaintiff sold that, with other bonds to him, at a discount beyond six per cent. This witness stated, that he could not say certainly, that the bond was made for the purpose of being sold at a rate of interest exceeding six per cent.; that Murchison did not say so, and therefore, he could not say that he knew it to be made for that purpose; that it was delivered to him to raise money and to sell it for as much as he could get; that the defendants were able to pay the bond at the time he sold it; that the plaintiff knew nothing of what passed between him and Murchison at the time the bond was executed.

Plaintiff's counsel asked the Court to instruct the jury, that the bond would only be void, if made expressly for the purpose of being discounted contrary to law.

But his Honor charged the jury, that if they believed the evidence, the plea of usury was established. Defendants excepted.

The jury, under this instruction, found for the defendants,

and the Court having given judgment in their favor, plaintiff appealed.

Haughton, for the plaintiff.
Phillips, for the defendants.

Nash, C. J. The question presented is one of alleged usury. Repeated attempts have been made, in this State, to induce the Legislature to repeal, or modify the law concerning usury, and which have as often failed. It is, therefore, the established policy of the State, to retain the law forbidding the taking of usury, and though the act is a penal one, it is the duty of the judiciary to enforce it, in all cases, where the law applies, and as far as they can, to defeat every effort to evade it. The practice most frequently resorted to, to evade it, is that of sales, or pretended sales, of notes and other paper securities. Much difference of opinion exists, not only in decided cases, but among elementary writers upon the subject. 1 Parsons on Contracts, 421–'7. The difficulty has been to lay down some definite and practicable rule which shall distinguish between a sale, or a loan, in such transfers. The Supreme Court of this State, has, in several cases, laid down this principle clearly. In *Collier* v. *Neville*, 4 Dev. Rep. 30. The Court say: "The *discounting* of a bill or bond and taking the general endorsement of the holder, does *ex vi termini* constitute a loan, and if the rate of discount exceed that fixed by the statute, it is an usurious loan." This case is followed by that of *McLure* v. *Collins*, 4 Dev. and Bat. Rep. 210, in which, Collier's case is approved. The Court say: "But the ordinary transaction of discounting a note or bill with an endorsement or guarantee of the transferer, is a lending within the statute. The party discounting does, in fact, lend money, on interest, to be repaid, either by the person receiving, or by some other party to the bill. There is a distinction between taking a bill, and advancing money on it, with an endorsement, or guarantee, and one without. The last is a purchase, and may be for less than the real value;

the former is a loan, and within the statute of usury; the policy of the law is to enable the defendant, to make void, both assurances, in toto." This case is followed by that of *Ballinger* v. *Edwards*, 4 Ire. Eq. 449. In speaking of a purchase of a note or bill for less than its real value, the Court say: "But that is subject to this qualification, that it must be merely a purchase of the security, and at the risk of the purchaser, and therefore, if the person who claims to be such purchaser, holds the party to whom the money is advanced, responsible for the payment of the debt, it is not in *law*, or in fact, a purchase, but a loan of money upon the security, &c." The only other case to which I shall refer, is that of *Ray* v. *McMillan*, 2 Jones' Rep. 229. These cases establish a clear rule by which to distinguish between a sale of a bill or note and a loan, to wit, when the instrument is transferred by the endorsement of the person receiving the money, it is a loan, because the endorser is liable for the debt; but when the transfer is simply by delivery, it is a sale, if the transaction is bona fide.

What are the facts in this case? Murchison was obliged to raise a considerable sum of money to meet his liabilities at the succeeding County Court. He executed the note, in question, made payable to the defendant, who endorsed it over to the plaintiff, without any restriction, at a discount of more than six per cent. per annum. According to the cases referred to, the money was a loan to the defendant, and at a rate of discount, reserving more than six per cent. per annum. This was usurious.

It is contended by the counsel for the plaintiff, that his Honor below erred in charging the jury, that if they believed the evidence, it established the plea of usury; that the intention with which the note was made was a matter of fact to be ascertained by them. There was no question of intention involved in the case to be submitted to the jury. In *Collier* v. *Neville*, it was held to be clear, that the discounting a bill or bond, and taking the general endorsement of the holder, does *ex vi termini* constitute a loan, and if the rate of discount ex-

ceed that fixed by the statute, it is usurious. This is reiterated in *Ray* v. *McMillan*, 2 Jones 227. In that case as in this, that of *Kerr* v. *Davidson*, 13 Ire. Rep. 454, was relied on to support the objection, that though a loan be made at a greater rate of interest than six pet cent., it is not usurious within the statute, unless there be a corrupt intent to violate the law, which is a question of fact for the jury, and it is, therefore, error in the Judge to treat it as a question of law.

Judge Battle, in commenting on Kerr and Davidson, observes: It is true, when the excess of interest may have been taken, because of a mistake in a matter of fact, as for instance, upon an erroneous calculation of interest, there the testimony must be submitted to a jury, to ascertain whether there was a mistake or an usurious taking by design. This, says the opinion, and nothing more, was the decision in Kerr and Davidson.

There is another feature in this case upon which no stress is laid, because it is desirable to clearly point out the distinction, between a sale of a bill or note, and an usurious contract growing out of the transfer of such instrument.

The feature to which I allude is, that the note, in this case, was obviously made to be thrown into market—no stress, however, is laid upon this fact, for the reason above stated.

Per Curiam. There is no error, and judgment affirmed.

SAMUEL COUCH *v.* GEORGE W. JONES, *Adm'r., et al.*

To work a hired slave at the business of blasting rock, in the night time, when fragments of falling rocks could not be seen, would not be taking ordinarily reasonable care of such property.

But if a hired slave of his own accord, against the directions of the hirer, without his knowledge or consent, in the twi-light, when his presence was not easily discovered, took the place of one of the regular hands at that business, and was killed by a falling rock, the bailee would not be liable for the loss. Pearson, J., *dissentiente.*

ACTION on the CASE, tried before SAUNDERS, Judge, at the Spring Term, 1857, of Orange Superior Court.

The plaintiff declared for the value of a negro, hired by him to the defendants, and killed whilst in their service on account of their want of proper care.

John Parker, a witness for the plaintiff, testified that Calvin was hired to the defendants for the year 1853, and again for 1854, to work upon the North Carolina rail-road, upon which they were contractors; that he was himself in their employment, principally engaged in blasting stone out of the road-bed, and that he was assisted in that business by one other white man, and four slaves belonging to the contractors; that on the 4th of February, 1854, he had prepared six drills for blasting, late in the evening, which were fired off after it was too dark to see fragments of falling stones, which might be thrown up; that Calvin assisted in loading the drills, and touched the fuse of one of them with a lighted match; that they all ran off when the matches were applied, and had proceeded about a hundred and fifty yards, when Calvin was struck down dead by a falling stone, weighing twenty-five or thirty pounds, which struck him on the head; that it was not Calvin's business to attend to the blasting, but to dump carts, and before the matches were applied, Mr. White, the defendants' general agent and superintendant, in a loud voice, gave notice to all the hands, who were working in the cut, to remove their carts, and leave, which was done. He further stated, that Mr. White was at the place where they were preparing the blasts some fifteen minutes before the one in question took place, and during that time, Calvin was there also, assisting in loading the drills with gun-powder and preparing for the blasts, and that he remonstrated with Mr. White against the danger of blasting in the dark, when they could not avoid the fragments of falling stones, but the other persisted, and the blasting took place; that Abner, one of the regular blasting hands, left after Mr. White came up to where they were, and Calvin took his place; that there was a great deal of blasting of stone done in the year 1853, and

that although a general order was always given by Mr. White for all the other hands to leave before the matches were applied, yet, that Calvin had often, during the year 1853, assisted in loading and firing the blasts in the presence of Mr. White, and with his knowledge, but that he had not been thus employed in 1854, and that this was the first day in 1854 that the blasters and other hands worked together at the same place, and that they had never blasted before after dusk.

Stephen A. White, a witness for the defendants, stated that he was the general agent of the defendants and superintended the work; that he was present when this blast was made; that it was not quite dark, but deep dusk; that it was Calvin's business to dump the carts, and that before the matches were applied, he gave orders, in a voice, loud enough to be heard by all the other hands, for them to leave; that he did not see Calvin at the drills, and did not know that he was there; he saw four hands at the spot, and supposed them to be the four, whose duty it was to be there; that he always told the hands to leave before the blasting took place.

The Court charged the jury, that the defendants were bound to use ordinary diligence in the working of the slave, and if they should find that the blasting of rock was a dangerous business, and that the danger was increased by blasting after dark, it would be such an act of rashness as a man of ordinary prudence would not be guilty of, and as such, would make the defendants liable. But if the jury should further find that the appropriate business of the slave was to attend to the carts, and the overseer had given the order for those thus employed to get out of the way, and the others had done so, but that Calvin, against his general order, and without the knowledge of the overseer, had taken the place of one of the hands engaged in blasting, and in consequence was killed, their verdict should be for the defendants. Plaintiff excepted to to the latter part of this charge.

Verdict for the defendants. Judgment and appeal.

Norwood, for the plaintiff.
Bryan and *Phillips*, for the defendants.

Battle, J. The only part of the charge of his Honor to which the plaintiff excepts, is that wherein he instructed the jury, if they should find that the appropriate business of the slave in question was to attend to the carts, and the overseer had given the order for those thus employed to get out of the way, and the others had done so, but that Calvin, against his general order, and without his knowledge, had taken the place of one of the hands engaged in blasting, and in consequence thereof was killed, their verdict should be for the defendants. The counsel for the plaintiff contends that this part of the charge was erroneous; for that the instruction should have been, that under the circumstances of the case, the conduct of the defendants' agent was rash, and evinced, a reckless disregard of danger; that he ought not to have permitted Calvin to be present when the blast was made, and that by permitting his presence, he had not taken that degree of care of him which the law requires; and that, consequently, the defendants (his employers) were liable for the loss of the slave.

If the testimony of the plaintiff's witness, Parker, had been the only evidence in the cause, we concede that there would have been made out a plain case of the want of ordinary care, and the defendants would have been responsible; and so his Honor very properly instructed the jury. But the testimony of the defendant's witness, White, presented the case in a different aspect, and it was to that, the instruction complained of was directed; and it is our duty to say whether, in reference to that, it was erroneous. Now, it will be borne in mind that, with regard to the finding of the jury upon the comparative reliance to be placed upon the statements of the respective witnesses, we have nothing to do. It was their province alone, unassisted by an intimation, even from the presiding Judge, to determine which account of the transaction—that given by Parker, or that given by White—was to be taken as the true one. The office of the Judge was confined to the duty of in-

forming the jury what was the law applicable to the case in the different views in which it was presented by the testimony. In the absence of a prayer for any more special instructions, we think his Honor did all that duty required, when he charged that, upon one state of facts, which we see was that testified to by the witness, Parker, the defendants were liable for the loss of the slave, but upon another state of facts, which we also see was sworn to by the witness, White, the defendants were not, in law, responsible for such loss. Whether the latter instruction was erroneous is the only question which we have to consider. The testimony of White is, that he was the overseer of the hands when the fatal blast was made; that it was then not quite dark, but deep dusk; that it was not the business of the slave, Calvin, to make blasts, but to dump carts; that before the matches were applied, he gave orders in a voice loud enough to be heard by all the other hands, for them to leave, and that he always gave such orders on such occasions; that he did not see Calvin at the drills, and that he did not know that he was there; and that he saw four negroes only, there, on that occasion. In considering his Honor's charge, with reference to this testimony, we should take to be true the statement of the witness, Parker, that, during the preceding year, the slave, Calvin, notwithstanding the general order of the overseer, White, to the contrary, did sometimes assist in blasting, without rebuke from him; that on the occasion when the slave was killed, he took the place of one of the negroes, whose business it was to make blasts, that it was too dark to see falling stones, and that he had run off after the matches were applied, and had gone to the distance of about one hundred and fifty yards, when he was killed by a large fragment of falling stone. This occurred on the last Monday of February, 1854, it being the first occasion on which blasts were made that year. The slave, Calvin, was hired by the defendants to work on the rail road, and his proper business was that of dumping carts. The defendant had the right, therefore, to set him to work at the place where the blasting was done, and the only ground of complaint which

can be made, is that he was permitted to take the place of one of the blasting hands, and to assist in setting fire to the matches. The enquiry is narrowed down to this, then—was it the omission of ordinary care in the overseer not to have seen that Calvin was present, assisting in fixing off the blast? The counsel for the plaintiff contends that it was; and that he might have seen Calvin and ordered him away, had not the blast been made in the night. The witnesses differ somewhat in their statements as to the degree of darkness which then prevailed; but neither of them says it was too dark to see a man, or to distinguish one man from another, though it was too dark to see the falling stones. Mr. White says that he did see four men, (the proper number present,) but he did not observe that Calvin was one of them. Calvin had just before, as Mr. Parker says, changed places with Abner, one of the regular blasting hands. Was it a want of ordinary care in Mr. White, the overseer, not to have noticed the change? Mr. White had not ordered him to be there; on the contrary, he had just before, in a loud voice, told all except the regular hands, to leave. His indulgence in the previous year, to Calvin's propensity for the business of blasting, may lead us to believe, that if he had seen him, he would not have driven him away. He had, however, on that occasion, in a general order, told him to leave, and his only fault then, (if fault it was) was in not having seen Calvin change places within Abner. Was this an omission of ordinary care for Calvin's safety? Upon the best consideration which we are able to give to the subject, we are constrained to say, that we do not think it was. "Ordinary care, (say the Court, in *Heathcock* v. *Pennington*, 11 Ire. Rep. 640,) is that degree of it, which in the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own." This definition does not fix a standard by which any thing like an approach to mathematical exactness and certainty can be attained. The very nature of the subject forbids it. What man can be selected as the model of ordinary prudence? What is ordinary prudence, as distinguished from that which is more or less

than ordinary? It is very nearly, if not quite impossible, for any one man to establish a certain and invariable standard for himself, much less for others. In such cases the law has given a rule, without affording us a certain guide, by which to follow it. Necessity requires some rule, and therefore, the law has prescribed one. The nature of the subject prevents an approach, in such rule, to more than moral certainty, and we must be content to follow it as best we can.

In the care which is to be taken of a slave, he is to be considered an intelligent being, with a strong instinct of self-preservation, and capable of using the proper means for keeping out of, or escaping from, scenes of danger. "Hence (say the Court in the above cited case of *Heathcock* v. *Pennington*,) the same constant oversight and control are not requisite for his preservation, as for that of a lifeless thing or an irrational animal." So, in the case of *Herring* v. *Wilmington and Raleigh R. R. Company*, 10 Ire. Rep. 402, the Court saying that, under the particular circumstances stated, the engineer of the rail-road cars would have been guilty of negligence in running over a log of wood, or a cow, added: "But as the negroes were reasonable beings, endowed with intelligence as well as the instinct of self-preservation, and the power of locomotion, it was a natural and reasonable supposition, that they would get out of the way, and the engineer was not guilty of negligence, because he did not act upon the presumption that they had lost their faculties by being drunk, or asleep." Again, in the case of *Swigent* v. *Graham*, 7 B. Mon. (Ken.) Rep. 661, it is said that, a slave, being capable of voluntary motion, of observation, experience, knowledge and skill, is presumed, in ordinary cases, to be capable of taking care of himself, if disposed to do so, without constant supervision or physical control.

Let us apply these principles, so well sustained by authority, to the case before us, and see what will be the result. We will admit that the blasts were the more dangerous by being in the night, and if Calvin had been one of the regular blasting hands, his owner might have complained of the overseer

for ordering him to do such work at such a time. But he was not ordered to be there. It was no part of his business to be there. On the contrary, his duty required him to be elsewhere. If there were greater danger from the falling stones then, than there would have been in the day time, his intelligence, and his instinct of self-preservation, ought to have kept him out of the way of harm. If the overseer had learnt by experience, that the slave would not obey his orders to leave in the day time, he had no reason to suppese that he would run needlessly into danger at night. The overseer, therefore, had nothing to arouse his suspicions, so as to keep him constantly on the alert, to prevent Calvin from changing places with one of the hands, whose duty it was to blast. We do not believe that a man of less than extreme prudence, would have deemed it necessary to make such lookout, for the purpose of stopping Calvin from intermeddling in business with which he had no concern. We think that *Heathcock* v. *Pennington*, presented a case quite as strong as the present, against the hirer of a slave for the application of the rule of ordinary care. We cannot decide against the defendants in the present case, without unsettling the standard set up, in the one to which we have alluded, by the unanimous opinion of the Court.

Pearson, J., *dissentiente.* What amounts to ordinary neglect is a question of law, and it is for the Court to say, whether a given state of facts fixes a party with the charge of such neglect. Every case, therefore, must depend on its peculiar circumstances, and it is seldom possible to generalise and establish a principle. For this reason, I did not file a dissenting opinion, although not entirely satisfied with the decision in *Heathcock* v. *Pennington*, 11 Ire. 640; for, I thought it amounted to ordinary negligence, to make a boy work at a dangerous position, from 9 o'clock at night, until the next morning, during the month of January, and that at least one of the hands should have been a grown person. Boys, are not going to sleep, at allotted hours, in order to prepare themselves

for night work, and it was not prudent to trust them entirely by themselves. In that case, the boy was hired for the purpose of driving the horse at "the whim." It was known to be dangerous, and that it had to be worked night and day. This clearly distingushes it from the present case, and besides, Ch. J. RUFFIN, in the opinion delivered by him, evidently confounds, "*ordinary*" and "*gross*" neglect. He uses the word "gross" as applicable to the degree of neglect, in that case, four times, and concludes that the defendant was not, under the circumstances, "exposed to the imputation of negligence, *much less gross negligence*." Yet, that case, is used as a guide for arriving at a conclusion in this, and this, will be used as fixing the principle, that if one gives a general order, although *he knows* that the party has been in the habit of disobeying it, and has no reason to believe that he will obey it on the particular occasion, he may screen himself, under such general order, from a liabitity to which his negligence would otherwise expose him. Against such a principle, I feel called on to enter my dissent.

His honor told the jury, that if blasting rock was a dangerous business, and the danger was increased by blasting after dark, "it was such an act of rashness" as would make the defendants liable. "But if the jury should *further find*, (that is, although there was this danger and rashness,) that Calvin's business was to attend the carts, and that the overseer had given an order for those thus employed, to get out of the way, but Calvin against his general order, and without his knowledge, had taken the place of one of the blasting hands, and in consequence was killed, the defendants would not be liable."

Blasting rock after dark is dangerous; the blasting foreman remonstrated against it, and the defendants' overseer was not only guilty of ordinary neglect, but of gross neglect—nay, rashness—in persisting and having it done. I have arrived at the conclusion, that the order for the other hands to get out of the way, does not relieve the defendants from liability, on account of this rashness of their agent, on two grounds:

1st. Suppose the order to have been given bona fide, in respect to Calvin, as the blast was to be made under circumstances of increased danger, a greater degree of vigilance being called for at the hands of the overseer, ordinary prudence required that he should see to it that his order was obeyed. It wont do for him to say that he did *not know* Calvin was there. This proves, either that it was so dark that he could not see, when none but a madman would set off a blast, or he did not take the trouble to look, although as we are to assume, he was about to do a rash act. If one of the regular hands had been killed, there is no doubt the defendants would have been liable, although they were hired for the purpose of doing this dangerous work, and it would seem, there should be a like liability in respect to Calvin, who was hired for ordinary work, and who ought not to have been permitted to have any thing to do with blasting.

2nd. But in the second place; Calvin had worked under this overseer the year before; he knew that Calvin was in the habit of disobeying his general order; so, in respect to Calvin it amounted to nothing, and was the same as if the he had been excepted out of it. How can the law allow such an order, impliedly revoked as to Calvin, and allowed to be disregarded by him, as a thing of course to be set up, and have the effect of relieving the defendants from a liability to which, it is admitted, they were otherwise exposed on account of the rashness of their agent?

State v. *Privitt*, 4 Jones' Rep. 100, furnishes an analogy in reference to the effect that this general order is entitled to. The defendant was indicted under the late statnte, for a sale of liquor to a slave by his clerk. The clerk swore that he had general instructions, from the defendant, not to sell to slaves. It was left to the jury to say, whether by a course of practice to the contrary, or by a special approval, the general instructions were not abrogated. The defendant was convicted, and on appeal, this Court concur in the opinion given of the general instructions in the Court below, and intimate that he had been dealt with very favorably. The opinion

concludes with a suggestion, that if general instructions are to have the effect contended for, the statute would be very easily evaded. In our case a general order is allowed to have the effect of relieving from liability, and nothing is said, and no stress is given to the fact of its being virtually abrogated "by a course of practice to the contrary, or by special approval."

PER CURIAM. Judgment affirmed.

L. H. HARE *v.* WILLIAMSON PARHAM, *Adm'r.*

Where a warrant has been brought against an administrator for the debt of his intestate, and the justice before whom it is returned, renders a judgment against him individually, it is error, for which a *recordari*, in the nature of a writ of error, is a proper remedy.

The general rule is, in such a case, simply to reverse the false judgment; but where it appears that the plaintiff was entitled to a judgment against the assets in the hands of the administrator, the Court will order the case back to the Superior Court, that the question of assets may be tried.

THIS was an action of DEBT, tried before BAILEY, Judge, at the Fall Term, 1856, of the Superior Court of Granville.

It had been commenced before a justice of the peace, on a warrant, and was brought against the defendant as administrator of one Hester, on a bond made by the intestate. The justice of the peace, who tried the warrant, rendered a judgment against the defendant, in his individual capacity, with a stay of nine months. The defendant obtained a recordari to have the same reversed for error, and the record of the case was made and certified into the Superior Court. The plaintiff filed affidavits to show that the debt was just, and that the defendant had voluntarily submitted to the judgment rendered. The defendant, on the other hand, filed affidavits to show that the judgment was rendered against his consent, and from ignorance on the part of the magistrate, who, it

was alleged, only intended to enter a suggestion of a want of assets, and to give the defendant nine months to plead. On consideration of the case in the Superior Court, his Honor dismissed the certiorari, and gave judgment against the defendant for the debt, from which the latter appealed to this Court.

Miller and *Graham*, for plaintiff.
Winston, Sen., for defendant.

Battle, J. It is apparent, to us, that the judgment of the Superior Court is erroneous, and must be reversed. The error seems to have arisen from the Judge in the Court below having treated the writ of *recordari*, in this case, as an attempted substitute for an appeal. It could be so treated, only, when the party had been improperly deprived of his right of appeal, or had lost it by accident or mistake, without any default on his part. There is no allegation of facts, made in the petition, upon which the application for the writ was founded, that the petitioner ever applied to the magistrate to be allowed an appeal, or that he was prevented from appealing by the misconduct or fraud of the opposite party. The petitioner has not stated any case which entitled him to have his cause placed upon the trial docket of the Superior Court as upon an appeal. The real ground of complaint, as set forth in the petition is, that the magistrate, "from not understanding his duty, in the premises, and the proper form of proceedings in such cases, had rendered a judgment against him which is false and erroneous." This is one of the cases, then, in which the *recordari* has been applied for, to be used as a writ of false judgment; and that it may be so used, in this State, cannot be doubted. See *Parker* v. *Gilreath*, 6 Ire. Rep. 221, and *Hartsfield* v. *Jones*, (ante, 309). Such being the nature of the cause, the affidavits taken in it, were unnecessary, as they could not properly be considered in the Superior Court. In that Court, the plaint, as recorded by the magistrate, was the only subject for review, and upon such

review, the judgment ought to have been affirmed, if right, or reversed, if erroneous. 3 Bouvier's Inst. 560. That it was erroneous, and ought to have been reversed, cannot admit of a doubt. The warrant was against the defendant as administrator, and the judgment was rendered against him individually, which was clearly wrong. *Shearin* v. *Neville*, 1 Dev. and Bat. Rep. 3. The order of the Superior Court dismissing the petition, and the judgment given thereupon against the defendant and his sureties, are erroneous, and must be reversed, and this must be certified to the said Court, to the end, that the judgment rendered by the justice, out of Court, may be there reversed.

The counsel for the defendant contends, that a judgment of reversal simply, is the only judgment which that Court can give, and for this, he cites several authorities. In 2 Bac. Ab. page 503, it is said that, "if a judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment shall only be *quod judicium reverseter*, for the writ of error is brought to be eased and discharged from that judgment." See also 6 Com. Dig. Tit. Pleader; 3 B. 20, page 465; 3 Bouv. Inst. 554. That such is the general rule, may be true, but we think, under the peculiar circumstances of this case, the Court may go further, and order the cause to stand on the docket, with permission to the defendant to plead any plea relative to his assets, which could be pleaded, had the suit been instituted returnable to the said Court. The peculiar circumstances to which we refer, arise from the provisions of the law, in relation to warrants against a party who is an executor or administrator, and the action of the magistrate with reference thereto in the present case. The Act of 1828, (1 Rev. Stat. chap. 46, sec. 24, 25; Revised Code, ch. 46, Sec. 34, 35,) directs that when any executor or administrator shall be warranted for any demand against his testator, or intestate, before the expiration of nine calendar months from the time of his qualification, it shall be the duty of the magistrate to postpone the trial, by an endorsement on the warrant, to a period beyond that time. If on the trial,

the executor, or administrator wishes to avail himself of the want of assets, he must suggest it to the magistrate, to be by him endorsed on the warrant, who may thereupon ascertain the justice of the claim, and give judgment therefor, and then return the warrant with the endorsement and the judgment, to the first term of the county court, where the defendant may enter such plea as he may think necessary relative to his assets. Some such purpose, we must suppose, the magistrate had in view when, after giving judgment against the defendant, he made the entry: "The defendant pleads nine months stay of this judgment." This could not have been intended for a mere stay of execution, for that could not have been pleaded at all, much less by the defendant. It could have been granted only at the instance, or by the permission of the plaintiff. The only plea, or thing in the nature of a plea, which the law authorised, was a suggestion by the defendant of a want of assets. That plea could not be tried by the magistrate, and it would be useless, therefore, to let the case go back to him. By this erroneous proceeding, the defendant has not yet had an opportunity of availing himself of it, and we think he has a right to do so in the Superior Court, to which the writ of *recordari* removed the cause. On the other hand, we think the plaintiff is entitled to have his debt paid out of the assets in the hands of the defendant, should it be found that he has any. His judgment is reversed, not because it appears upon the record of the proceedings before the magistrate that he is not entitled to any judgment at all, but only because his judgment against the defendant individually, is erroneous, and the Superior Court ought, therefore, after reversing that judgment, to render a proper one in his favor, such as, under the act to which we have referred, will allow the defendant to avail himself, by plea, of any defence he may have relative to his assets. This, we think, will be found to be sustained by the judgment of this Court in the case of *Shearin* v. *Neville*, above referred to. The judgment of the Superior Court is reversed, and a certificate will be sent to

that Court, to the end that the proper orders, as indicated in this opinion, may be there made.

PER CURIAM. Judgment reversed.

STEPHEN W. COTTEN *v.* JOHN Z. DAVIS.

Where a slave is put into the hands of a child, upon the marriage of such child, without any written transfer, and afterwards the parent wills such slave to a third person, upon the death of the parent the possession of the child becomes adverse towards the legatee, and the statute of limitations runs from that period.

ACTION of TROVER, tried before SAUNDERS, J., at the Spring Term, 1857, of Chatham Superior Court.

The action was brought for the conversion of Peggy, a slave, and her two children. The mother of Peggy had been placed by Roderic Cotten in the possession of his son, R. C. Cotten, upon the marriage of the latter in 1815. R. C. Cotten never had any written title to the slave in question, and did not claim that she belonged to him. In 1827, Roderic Cotten bequeathed Peggy's mother, together with her children, to his widow, Mrs. Anne Cotten. The mother died in the possession of R. C. Cotten, and Peggy, who was born there, remained with him till 1838, when Mrs. R. C. Cotten, who had a separate estate in certain other slaves which had come to her from her father, gave Peggy and nine others, by parol, to the defendant, who had then lately intermarried with her daughter. This was done with the knowledge of R. C. Cotten, and was in accordance with the course which Mrs. Cotten had pursued towards her elder daughter upon her marriage, to whom she had given, in the same way, ten slaves.

Peggy remained ever since in the possession of the defendant, who exercised acts of ownership over her and her children, hiring them out, and otherwise treating them as his own.

Mrs. Anne Cotten died in 1846, and after bequeathing all the slaves in her possession to S. W. Cotten, constituted him her general residuary legatee, and appointed him executor. He immediately proved his mother's will, and undertook the execution of the same. This suit was brought 11th of August, 1853. It was shown that the parties to this suit had been upon unfriendly terms for eight or ten years.

The counsel for the defendant requested his Honor to charge the jury,

1st. That the gift, in 1838, to John Z. Davis, was a conversion, and, therefore, that the statute of limitations began to run from that date.

2nd. That the great length of time during which Peggy and children had been out of the possession of those claiming the legal right to them, with the attending circumstances, would warrant the jury in making a presumption that would confirm the title of the defendant.

A verdict was taken, subject to the opinion of the Court, whereupon his Honor, being of opinion against the defendant, gave judgment for the plaintiff.

Defendant appealed.

Winston, Sen., for plaintiff.
Haughton, *Phillips* and *Miller*, for defendant.

Pearson, J. When a parent makes a parol gift of a slave to his child, it is held, that the effect of the act of 1806 is to make the child a bailee. Such a gift, however, differs essentially from a mere loan; (*Cowan* v. *Tucker*, 5 Ire. 78;) for the child accepts it with the expectation that it will be confirmed by the parent, in his life-time, or by his will, or by the law, in case the parent dies intestate. Indeed, the transaction is looked upon by both parties as intended for an advancement; the parent, for special reasons, choosing to retain the title. So, although it is called a *bailment*, the relation is not that of one who hires or lends a slave to his child. In the same way, when a mortgagor remains in possession, or a purchaser is

let into possession under a contract of sale, the relation is called a "tenancy at will," for the want of some other term, although there is no rent reserved, no services, and no tenure; all of which are necessary to constitute the relation of "landlord and tenant."

If the parent, after such a gift, sells the slave, or makes a deed of gift to a third person, that certainly amounts to a revocation, and puts an end to the bailment; so the relation of bailor and bailee does not exist as between such third person and the child; their claims are conflicting and adversary, and, in the absence of any arrangement between them, the possession of the child for more than three years will bar the right of such third person. We can see no reason why this principle does not apply to the case of a gift by will. The rights of the legatee are inconsistent with any right whatever in the child; the parol gift is revoked, and the possession of the child is adverse; for in no sense of the word can he be called a bailee of the legatee.

In our case, by the will of Roderic Cotten, the slaves are given expressly to Anne Cotten. This revoked the parol gift of the testator to his son, R. C. Cotten, and unless there be some other element in the case to prevent it, the rights of Anne Cotten and R. C. Cotten were adversary, and his possession was necessarily adverse. It is said this effect is prevented by the fact, that R. C. Cotten, for some reason or other, did not claim the slaves as belonging to him. The reply is, that in 1838, R. C. Cotten's wife, with his knowledge, made a parol gift of these slaves and others, to the defendant, who had then lately intermarried with their daughter; and he has claimed them as belonging to him from that time up to the present. Now, although if this had been done in the life-time of Roderic Cotten, it might not have terminated the bailment, because it was, in some degree, consistent with the purpose of the original gift, a question which it is not necessary now to decide, yet being done after the title had passed to his legatee, it certainly had the effect of rebutting any inference to be drawn from the fact that R. C. Cotten had not before set

up claims to the slaves; at least it would have had that effect if the legatee had been a stranger, and not his mother.

This presents a second consideration. Anne Cotten being the mother of R. C. Cotten, it is suggested that her permitting the slaves to continue in his possession, amounted to a gift on her part, and created a like relation of bailor and bailee, as had previously existed upon the original gift by her husband. It is unnecessary to complicate the case by entering upon this subject; for suppose that to be so; Anne Cotten died in 1846; in her will certain negroes are given by name to the plaintiff; all the horses mules, &c., are also given to him, and the residuary clause gives him "the balance of the estate of every description," and he is appointed the executor. This terminated the bailment between Anne Cotten and the defendant, which, for the sake of the argument, we have supposed to exist. The plaintiff's right as executor, and as legatee, to these slaves, was inconsistent with the claims of the defendant; there was no arrangement, express or implied, between them. It was the duty of the plaintiff, as the executor of Anne Cotten, to take into his possession all of her estate, and deliver it to the legatees. The fact that he is the legatee does not affect the question. We are to suppose that, at the end of two years, he had collected the estate, and settled it according to law. This brings us down to 1848. The writ issued in 1853; so, there is five years, during which he has a conflicting claim as legatee, with that of the defendant claiming under the original gift made by Roderic Cotten in 1815, and seven years, during which his duty as executor required him to take these slaves into his possession. We are of opinion that his laches during that time had the effect of vesting the title in the defendant, by force of the statute of limitations and his adverse possession. This conclusion is fully sustained by the reasoning, and the decision of this Court in *Simpson* v. *Boswell*, 5 Ire. R. 49. Indeed, our task has been simply to deduce a corollary from the two cases —*Cowan* v. *Tucker*, and *Simpson* v. *Boswell*, *ubi supra*.

It is proper to call the attention of the profession to the fact

that, unless the "statement of the case" sets out that by agreement a nonsuit is to be entered, if the Court should be against the plaintiff upon the points reviewed, this Court can do no more than order a *venire de novo*, which does not meet the intention, or end the case as if it had come up in a special verdict, or case agreed.

PER CURIAM. The judgment rendered is set aside, and a *venire de novo*.

JOAB MEARS *v.* JERVIS SPEIGHT.

No judgment can be taken upon a ca. sa. bond, if the debtor appears and answers when called at the Court to which he is bound, although his surety does not surrender him.

But on an appeal to the Superior Court, the debtor is still bound to appear, when called in the regular course of the Court, and failing to do so, the plaintiff is entitled to a judgment on the appeal bond.

MOTION for JUDGMENT upon the bond of an insolvent debtor, tried before PERSON, J., at the Spring Term, 1857, of Robeson Superior Court.

The defendant was arrested under a ca. sa., issued by a single justice of the peace, at the instance of the plaintiff, and gave bond for his appearance at the next term of the County Court of Robeson County, to take the oath under the insolvent debtors's act. At the term to which he was bound to appear, he was called and answered, but not having given notice, and his surety failing to surrender him, judgment was rendered on the bond against the principal and his sureties, from which the defendant appealed to the Superior Court.

In the Superior Court, the cause being regularly reached, the debtor, Jervis Speight, was solemnly called, and, on failing to appear, judgment was rendered against his sureties to the appeal bond, from which they appealed to this Court.

Leitch, for plaintiff.
Troy, for defendant.

Battle, J. There is not the slightest doubt that the judgment rendered in the County Court against the defendant and the surety on his appearance bond, was erroneous. Though the defendant had not given the notice of his intention to take the benefit of the insolvent oath, yet, as he appeared, no judgment could be rendered against him and his surety in the bond, because the surety was responsible only for his appearance. *Watson* v. *Willis*, 2 Ire. Rep. 17. This judgment, however, was vacated by the appeal from it to the Superior Court. The cause was then, by the appeal, properly constituted in the Superior Court, and was so treated by both parties. In that Court, it was as much the duty of the defendant to take the necessary steps for qualifying himself to take the benefit of the insolvent's oath, as it had been while the case was in the County Court. Among other things which it was his duty to do, he was bound to appear whenever he was called, in the regular business of the Court, and to take the oath, or, upon good cause shown, get a continuance of his suit until the next term. This is clearly shown by the case of *Wilkings* v. *Bingham*, 3 Ire. Rep. 86. This, the defendant, upon being solemnly called, failed to do, whereupon the plaintiff became entitled to judgment against him and the sureties to his appeal bond, for the amount of the debt, interest and costs. *Wilkings* v. *Bingham*, *ubi supra*; *Williams* v. *Floyd*, 5 Ire. Rep. 649.

Per Curiam. Judgment affirmed.

STATE *v.* CALVIN CRESS.

Where a penal act, upon which an indictment is founded, is repealed during the pendency of the indictment, the defendant is entitled to an acquital.

State *v.* Cress.

This was an INDICTMENT, tried before his Honor, Judge Dick, at the Spring Term, 1857, of Rowan Superior Court.

The charge was for selling spirituous liquors by a measure less than five gallons, against a statute regulating the town of Salisbury.

The jury found a special verdict to the effect that, on the 1st day of November, 1856, in the town of Salisbury, in the County of Rowan, the defendant did sell spirituous liquor by a measure less than five gallons, to wit, by one quart, not having then and there a license to do so from the board of commissioners or the said town; they further found that the Act of Assembly creating the offence had been repealed after the finding of the bill of indictment.

Upon this verdict the solicitor moved for judgment, which being refused by the Court, he appealed to this Court.

Attorney General, for the State.
Boyden, for defendant.

NASH, C. J. The defendant is indicted for selling spirituous liquors in the town of Salisbnry, by a less measure than five gallons. The private act, under which the indictment was drawn, was passed at the session of the Legislature held in 1848, whereby it was forbidden to any one to sell spirituous liquors within the corporate limits of the town of Salisbury, without a license therefor from the commissioners. The indictment here, was found at the Fall Term, 1856, of the Superior Court of Rowan County. Since the finding of the indictment, the act of 1848, under which it was found, has been repealed. His Honor held that the indictment could not be sustained. In this we concur. The foundation on which the indictment rested being removed, the indictment must necessary fall to the ground. See *Gov* v. *Howard*, 1 Murp. Rep. 465.

PER CURIAM. There is no error. Judgment affirmed.

G. G. AND WM. A. LEA *to the use of* THOMAS C. GREEN *v.* ANDREW BROOKS.

Costs cannot be given against one *to whose use* a suit is brought.

Before SAUNDERS, Judge, at the last Fall Term of Caswell Superior Court.

This was a RULE obtained by the defendant upon Thomas C. Green, to subject him to the payment of the cost of the suit, wherein G. G. and Wm. A. Lea, to the use of the said Thomas C. Green, were plaintiffs, and the said Brooks was defendant; and the facts, as admitted, are as follows: In that case, which was tried in the Superior Court of Caswell several years ago, the defendant obtained a verdict, the said G. G. Lea had removed, pending the suit, to another State, leaving no property in this State subject to execution, wherewith the cost of the suit might be paid, and the said William A. Lea was dead at the time the said suit instituted. The suit was brought to the use, and for the benefit, of the said Green, who had employed the counsel and managed it generally.

Upon the foregoing facts appearing, the rule *nisi* was made absolute. Whereupon the said Green prayed for, and obtained, an appeal.

Morehead, for plaintiff.

Fowle and *Bailey*, for defendant.

BATTLE, J. In common law, costs were not given to either party. They are, therefore, regulated altogether by statute. The act of 1777, continued in the Revised Statutes of 1836, ch. 31, sec. 79, and in the Revised Code of 1854, ch. 31, sec. 75, provides that, "in all actions whatsoever, the party in whose favor judgment shall be given, or, in case of nonsuit, dismission, discontinuance, or stay of judgment, the defendant shall be entitled to full costs, unless where it is, or may be, otherwise directed by statute." The judgment for costs is to be given *in favor of the party* who succeeds in the suit; but

against whom is it to be given? Certainly *against the other party* to the suit, for the Court has no other person before it against whom to render a judgment of any kind, unless in the case of a surety for the prosecution of the suit, or for an appeal, or a proceeding in the nature of an appeal, which is regulated by another statute. The person to whose use a suit is brought is no party to the record, and his name is inserted in the proceedings as a mere memorandum to show that he is authorised to receive the fruits of the recovery. The party plaintiff is the only person whom a Court of Law can recognize, and it is well settled that he has so complete a control over the suit, that he may dismiss it when he pleases, unless restrained by a Court of Equity in favor of a person who, in that Court, is regarded as the beneficial plaintiff. *Deaver* v. *Eller*, 7 Ire. Eq. 24. Upon principle, then, it would seem that the judgment for costs against Thomas C. Green, who was no party to the record, is erroneous. But the defendant's counsel have referred to, and rely upon, the case of *Ashe* v. *Smith*, 2 Hay. Rep. 305, as one directly in point to sustain the judgment against Green. They have referred us to several cases in New York, and to one in Indiana, in support of the same position. What necessity there was for such a departure from principle in those States, we do not know. It is very certain that there is no such necessity here. The act of 1787, embraced in the 40th section of the 31st chapter of the Revised Code, makes ample provision for the security of defendants against costs in suits commenced in a court of record, and a like provision is made in favor of defendants who may appeal from a judgment of a single magistrate by the act of 1831, which is to be found in the 104th section of the same chapter of the Revised Code. In either case the plaintiff may be compelled to give bond, with sufficient security, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect. There is no necessity, therefore, for our departing from all the rules and analogies of the law, by giving a judgment for costs against a person who is not, and cannot properly be made, a party to the suit. For

this reason we cannot approve of the course pursued by the Court in the above cited case of *Ashe* v. *Smith*. The case was decided at an early period of our judicial history, and has not been followed, so far as we are aware, by any similar adjudication. Had there been a necessity for it, the Court might possibly have compelled a person who abused its process, to pay the costs, by putting him under a rule to do so, or be attached for contempt. But it can have no right to proceed directly against such person by giving a judgment, and issuing and execution, against him. The judgment must be reversed, and this opinion certified according to law.

PER CURIAM. Judgment reversed.

Doe on the demise of MOSES GIBSON *v.* RUFUS GIBSON.

Where the word *issue* is used in a will, in relation to the interests of a son and three daughters of the testator, and as to the daughters, it is clear from other provisions of the will, (interpreted under a settled rule of law,) that *children living at their deaths* are meant, the same meaning must be attributed to it in regard to the son.

THIS was an ACTION of EJECTMENT, tried before SAUNDERS, J., at the last Spring Term of Guilford Superior Court.

CASE AGREED.

The lessors of the plaintiff claim title as heirs and devisees of Andrew Gibson. The defendant also claims title under Andrew Gibson, the land being the same that is devised to Joseph Gibson; and the question grows out of, and depends upon, the construction of the following clauses of the said will, which was made and published on the 24th day of February, 1823.

"5th. I will and devise unto Joseph Gibson, the tract of land on which I live, (reserving a life-estate, or maintenance, for his mother) also the shade room of my dwelling house,

two negroes, &c., * * * It is my will that if my son Joseph die before his wife Mariann, that she shall have the same right and privilege and maintenance, as she now has, so long as she remains his widow.

"6th. I will and devise unto my son Joseph Gibson, his executors, administrators, or assigns, in trust, to hold to the use of the heirs of Elizabeth Gibson's body, (but she to have a maintenance during her life,) a certain tract, or parcel of land, lying in the Counties of Guilford and Orange, (describing it,) also two negroes, (naming them and other personal property,) all of which I have heretofore loaned her, the said Elizabeth.

"7th. I will and devise unto Joseph Gibson, his executors, administrators, and assigns, in trust, to hold to the use and benefit of the heirs of Jane Gibson's body, (but she to have a maintenance during her life,) one-half a tract of land, known by the name of Thompson's tract, to be equally divided, as to quantity and quality, by my executors; also, two negroes, (naming them, and other personal property), with all the other property heretofore loaned.

"8th. I will and devise unto Joseph Gibson, his executors, administrators, and assigns, in trust, to hold to the use of the heirs of Nancy W. Gibson's body, (but she to have a maintenance during her life,) the other half of the Thompson tract to be divided as aforesaid, also four negroes, (naming them, and other personal property,) and as much other property as will make her heirs part equal to that of her sisters when they left me.

"I will and devise that if any of my children should die without issue begotten in wedlock, that their property return and to be equally divided among all my children, the said Joseph, trustee, holding such part in trust, that may, or shall, come to my daughters, to their children."

Joseph Gibson died without ever having a child.

The defendant claims as the devisee of Joseph Gibson; and it is agreed that, if Joseph Gibson took only a life-estate, under the will of his father, judgment shall be entered for the

plaintiffs; but if the Court be of opinion that Joseph Gibson took the fee simple judgment is to be entered for the defendant.

The Court rendered judgment for the plaintiff, and the defendant appealed.

McLean and *Morehead*, for plaintiff.
Miller, for defendant.

Battle, J. The case turns upon the construction of the will of Andrew Gibson, and the question is whether the limitation over, in the following clause, is too remote. "I will and devise that if any of my children should die without issue begotten in wedlock, that their property return to, and be equally divided among all my children, the said Joseph, trustee, holding such part in trust that may, or shall come to my daughters, to their children." The will was made before the 15th day of January, 1828, and, on that account, is not to be governed by the act of 1827, which declares that "dying without issue of the body," &c., shall be understood to mean dying without leaving issue, &c., living at the death of the devisee, unless a contrary intent plainly appear in the will. Before that act went into operation, the general rule was, that such expressions as dying without heir or heirs of the body, or without issue, or issues of the body, &c., annexed to a devise in fee, and preceding a limitation over of the estate, meant an indefinite failure of heirs, or issue of the body, and (as tending to create a perpetuity) made the limitation over too remote, and, therefore, void. But to this rule there were certain exceptions, as well established as the rule itself, which prevailed whenever the devisor used expressions in his will which showed that he intended to confine the dying without heirs or issue of the body, to a life, or lives, in being, and twenty-one years afterwards, a child in *ventre sa mere* being considered a life in being. See Fearne on Remainders, 467, *et seq.* *Davidson* v. *Davidson*, 1 Hawks Rep. 161; *Brown* v. *Brown*, 3 Ire. Rep. 134; *Long* v. *Norcom*, 4 Ire. Rep. 255.

It must be admitted, then, that the expression in the clause of the will to which we have referred, "if any of my children should die without issue begotten in wedlock," will make the limitation over too remote, unless an intention to restrict the meaning of the words can be found in the same clause, or in other parts of the will. This makes it necessary to enquire whether such an intention can be discovered in any part of the will, it being our duty to look to every part, in order to give a consistent construction to the whole. In the 5th clause of his will, the devisor gave to his son Joseph the tract of land now sued for, in terms which, by virtue of the act of 1784, (Revised Code, ch. 119, sec. 26,) if not by their own force, conveyed the fee. By the 6th item, he gave to his son Joseph certain land and slaves, in trust, for the heirs of the body of his daughter Elizabeth; "but she to have a maintenance during her life;" and by the 7th and 8th items, he made similar provisions for the heirs of the body, respectively, of his daughters, Jane and Nancy, subject to a maintenance for their lives, as in the case of his daughter Elizabeth. The terms "heirs of the body" of the daughters, mean their children, because the daughters are noticed in the will as being alive. Indeed the terms are so explained in the next clause, where the limitation over, which we are now considering, is found. That limitation applies to the death of each of the daughters without issue begotten in lawful wedlock, as well as to his son Joseph, all being equally his children. Now, as applied to the daughters, it is manifest that the devisor did not mean an indefinite failure of issue, but only to issue living at the death of each of them, respectively. The daughters took no estate, either legal or equitable, in the property, but it became vested in the children, burdened with a charge for the maintenance of their mothers. The meaning evidently was, that if either of the devisor's daughters died leaving no children, then the trustee should hold the property for the children of the other daughters, and upon the same terms as he held the land and slaves given to them directly. If this be so, then the same construction must be put upon the same

terms as applied to Joseph, for we cannot reasonably suppose that the devisor meant to distinguish between his sons and his daughters, when he made the same limitation over upon the death of each of his "children." His intention evidently was, that if any one or more of his sons died, leaving a child, or children, then his estate should become absolute in such child or children; but if he should leave no child, then his estate should go over to his surviving brothers and the children of his sisters, subject to the maintenance of such sisters.

Our opinion is that there is no error in the judgment given in the Court below, and it is affirmed.

PER CURIAM. Judgment affirmed.

THE SALEM MANUFACTURING CO. *v.* JACOB W. BROWER.

Where it is clear that early notice to a guarantor, of the failure to pay of the person whose debt he has guaranteed, could have been of no benefit to him, such early notice is not required, and the want of diligence, in this respect, does not impair the guarantor's obligation.

THIS was an action of ASSUMPSIT, tried before SAUNDERS, J., at the Spring Term, 1857, of Forsyth Superior Court.

The plaintiff, through its agent C. L. Banner, and the defendant, entered into the following agreement, viz:

"Salem, January 26th, 1844: An agreement between J. W. Brower of Surry county, North Carolina, and the Salem Manufacturing Company, viz: The Salem Manufacturing Company agrees to deliver to the said Brower, one thousand bunches of yarn, 5 lbs. each, from No. 5 to No. 10, averaging between No. 7 and No. 8, for the sum of $775, to be paid in good bonds on other persons; if not due, he, said Brower, is to make them due, by paying interest till due, which said bonds, he is to assign over for value received. The following are part of the bonds, viz: One bond on Robert Anglin,

due 26th of September, 1844, for $75—deduct eight months interest, $3,00; one bond on Robert Anglin, due 24th of September, 1845, for $75—deduct interest for one year and eight months, $7,50." These and other notes, mentioned in the same list, were endorsed by the payee, for value received, and delivered to Mr. Banner, the plaintiff's agent, and the cotton yarn was delivered by the latter to the former. In 1849, the agent, Banner, examined the schedule of bonds, set forth in the contract, and all having been collected except the two, now in question, upon Robert Anglin, the names of the defendant and the agent were torn off of the papers, but they were retained by the agent.

Anglin lived in Virginia, and the plaintiff caused suit to be brought on the said two bonds, in the Circuit Court of Franklin county, in that State, in the name of the said Brower, and at October term, 1851, of that Court, because of a breach of warranty in the article, (a smut machine) for which the said bonds were given, and the damages for which, were permitted, by the laws of that State, to be assessed and set off in the suit then pending, a verdict and judgment were rendered against the plaintiff, to the full amount of said notes; of which failure to collect, the plaintiff gave the defendant notice in 1852, or in 1853.

The defendant's counsel relied upon the want of a reasonable notice of the principal's failure to pay, also on the statute of limitations.

This suit was brought on 27th of January, 1855.

His Honor was of opinion that the plaintiff was entitled to recover, and so instructed the jury. Defendant excepted.

The jury rendered a verdict for the plaintiff, and judgment being entered by the Court, the defendant appealed to this Court.

Morehead, for the plaintiff.
McLean and *Ruffin*, for the defendant.

Nash, C. J. We concur with his Honor below, that the

plaintiff is entitled to a judgment for the sum awarded him by the jury. On the 26th of January, 1844, the defendant purchased from the plaintiff a quantity of cotton yarn, and in part payment transferred to the Company, by endorsement, the bonds in question, given by one Anglin. This was done in pursuance of an agreement, that the cotton was to be paid for in good notes on other persons. Anglin lived in Virginia, and suit was brought against him in the name of the defendant, and judgment was rendered in favor of the defendant on the 13th day of October, 1851. This action was brought to Spring Term, 1855. Notice was given to the defendant of the failure to recover on the bonds in 1852 or '53. Before a guarantor can be held liable on his guaranty, he must have notice of the failure of him whose debt he has agreed to pay. If any time is specified in the contract within which notice is to be given, the plaintiff must prove that notice was so given. If no time is specified, then notice must be given in reasonable time. What is reasonable time is a question of law. It is required to enable the guarantor to save himself. If, however, the notice is delayed for a long time, and it is, nevertheless, clear that the guarantor could have derived no benefit from an earlier notice, the delay will not impair his obligation to pay. 2 Parsons on Con., 174. *Clark* v. *Reamington*, 11 Metcalf 361. Now it is very certain that the defendant Brower could have suffered no loss in not receiving earlier notice of the failure of the suit against Anglin. The suit was in the name of Jacob W. Brower, and upon the bonds in question; so there is a judgment upon the bonds in favor of Anglin on these very notes, which will forever bar a recovery upon them against Anglin. But if the notice was given either in 1852 or '53, the statute does not bar, three years not having expired before the commencement of this action.

Per Curiam. Judgment affirmed.

COUNCIL SCOTT *v.* THE WILMINGTON AND RALEIGH RAIL ROAD COMPANY.*

The killing of a cow, or other animal on a rail road, by the train's running over it, is not, of itself, proof of negligence.

ACTION of TRESPASS on the CASE, tried before BAILEY, J., at the last Term of Wayne Superior Court.

The declaration was for negligently running their train upon the rail road track, by which a cow, the property of the plaintiff, was killed.

It was proved that, in 1851, about sun-rise in the morning, a cow, the property of the plaintiff, was seen by the witness on the side of the rail road belonging to the defendants, and not far off from it, dead; that the cow had been manifestly killed by the engine, or cars, in their passage over the road. No train had passed during the night. The mail train that had passed the preceding afternoon, was the last that had passed previously to his finding the animal, and, at that time, the witness was working not far from the spot where he found it.; that the whistle of the engine blew but once, as the train passed that spot; that the cars were going at the rate of twenty miles an hour; that the road in this part was straight, and the woods open, and that a cow could be seen on the track a mile distant; that the plaintiff lived about two hundred yards from the road, and his cows were in the habit of feeding near the road; and this was known to the plaintiff. The cars passed along at the usual time, on the evening before.

The Court charged the jury that, according to this state of facts, the plaintiff was entitled to recover. To which defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Dortch, for the plaintiff.

B. F. Moore and *W. A. Wright*, for defendant.

*Judge BATTLE, being a stockholder in this company, took no part in the decision of this cause.

PEARSON, J. In the case of *Herring* v. *Wilmington and Raleigh Rail Road Company*, 10 Ire. Rep. 402, the facts were nearly the same as are presented by this case, with this difference—there, the property destroyed was a slave, here, it was a cow. It was held, in that case, that the facts did not show negligence on the part of the defendant. We consider that holding, decisive of this case.

The plaintiff's counsel, in the argument, admitted that the opinion of the Judge in the Court below could not be sustained, except upon the broad ground that, if a cow is killed by the rail road car, that fact itself is proof of negligence, and entitles the owner of the animal to recover, unless the defendant is able to rebut the presumption of negligence. He relied upon *Ellis* v. *Portsmouth and Roanoke Rail Road Company*, 2 Ire. Rep. 138. That case, and *Piggot* v. *East Co. R. R.*, E. C. L. Rep. 229, upon which it is founded, are commented on, and explained in Herring's case, where it is said, "In both these cases fire was communicated to the property of the plaintiff; in the one case, a barn, and in the other, a fence was set on fire by sparks from the cars. It was proven in both cases that the cars had been running for a long time, and *things remaining in the same condition*, the fact that fire was communicated on a particular occasion, was properly held to be *prima facie* evidence that it was the result of negligence." The opinion then proceeds to point out the distinction between a fence, or a barn, which are *stationary*, and an animal, which has the power of locomotion. The conclusion is, that in respect to to the latter, the principle has no application, because things do not remain in the same condition. In the former, the plaintiff's property *remains where it was*, and if it is set on fire, that fact, of itself, shows that there was something wrong about the defendants' works, or their management, and throws on them the burthen of showing some unusual cause—such as a gust of wind. In the latter the plaintiff's property *changes its position*; so, things do not remain in the same condition, and how the matter occurred is open for en-

quiry; and as the plaintiff alleges negligence, it is for him to make the proof.

The opinion, then, discusses the question of negligence, as an open question, between a log of wood, a cow, and a slave, to which it is not necessary now to advert; for, as stated above, the ruling below cannot be sustained, except upon the principle above referred to, which, as we have seen, has no application to a case where damage is done to property that has the power of locomotion, and which happens to be on the track, or to jump on it at the crisis. There is error.

PER CURIAM. The judgment must be reversed and a *venire de novo.*

WILLIAMSON WALLACE, *Adm'r.*, *v.* A. C. McINTOSH, *Adm'r.*

It is no objection to the declarations of a slave, as to the state of its health, that it furnishes additional evidence of its truthfulness.

Therefore, where a female slave declared that she was affected with a *prolapsus uteri,* and offered to submit to an examination of a person, in verification of her statement, the latter part of the discourse forms no good ground of exception to the evidence.

ACTION of COVENANT for a breach of warranty, tried before DICK, Judge, at the last Spring Term, of Mecklenburg Superior Court.

The only question in this case was, whether the declaration of Mary, the slave, whose ill health was alleged as the breach of the covenant declared on, was admissible. The overseer proved, that more than once, the slave told him she had a falling of the womb, and in the last conversation, she added, that she would exhibit her person to prove what she stated. This latter part of the slave's statement was objected to, upon the ground, that nothing, besides the declarations as to the mere facts of the disease, were admissible, and declarations going to prove the truth of her statement, were improper. The tes-

timony was excluded by his Honor, and the plaintiff excepted.

Verdict and judgment for the defendant. Appeal by the plaintiff.

Wilson, for plaintiff.
Osborne and *Jones*, for defendant.

Battle, J. That the declarations of a slave as to the state of his health at the time when they are made, are admissible in evidence, in a suit against a white man, is settled. See *Roulhac* v. *White*, 9 Ire. Rep. 63; *Biles* v. *Holmes*, 11 Ire. Rep. 19, and the cases therein referred to. This was not disputed on the trial in the present case, and the declarations of the girl, Mary, as to her bodily condition, on several occasions, when she abstained from field-labor, were admitted without objection. The testimony which was excepted to, seems to us, to have been of the same character, and ought to have been received. The only perceptible difference beween it, and that which was admitted is, that it furnished additional evidence of its truthfulness. Its tendency was to show that the woman was not feigning illness with the view to avoid the performance of her duty as a field-hand. It was calculated, therefore, to furnish the very means which would enable the jury to determine whether she was speaking the truth, or uttering false complaints of sickness. In such cases, "it must be left, (say the court in *Biles* v. *Holmes*,) to the good sense of the jury, connecting the declarations with the acts and looks of the party and other circumstances, to say how far such evidence is to be relied on." Here, the offer of the woman to subject herself to the examination of the overseer, at the very time when she declared that she was then laboring under a disease, was a circumstance well calculated to show that she was not uttering a falsehood. It was, indeed, a part of the declaration, and could not fairly be separated from it, and in excluding it, we think the presiding Judge

committed an error. The judgment must be reversed, and a *venire de novo awarded.*

PER CURIAM. Judgment reversed.

Doe on the demise of JOHN R. TAYLOR v. JOSEPH H. GOOCH.

Where there is a trust, created by the agreement of parties, the possession of the *cestui que trust* is not adverse to that of the trustee, and cannot, no matter how long it has been continued, divest the title of the trustee.

One who purchased a trust-estate, under execution, before the Act of 1812, only got the possession of the defendant in the execution, and the equitable right to be substituted to the rights of the creditor, whose debt he had paid.

ACTION of EJECTMENT, tried before MANLY, Judge, at the Spring Term, 1857, of Warren Superior Court.

The plaintiff showed an occupation of more than thirty years, and then put in evidence a deed from Lewis, and Henry Potter, to Solomon Walker, dated 17th of August, 1790, and also the will of Solomon Walker, proved at the September term, 1791, of the county court, devising the land to his son, John Walker, and showed possession by Solomon and John Walker, under their respective titles, for more than seven years, claiming the land as their own. He also proved, that John Walker, who married in 1796, left four children, of whom Elizabeth was the eldest. She intermarried with Hezekiah Hobgood, on the 26th of January, 1817, and died leaving three children, of whom Mary, the female lessor of the plaintiff, was one. She intermarried with John R. Taylor, on 7th of January, 1842. Plaintiff put in proof John Washington's appointment as guardian of Elizaheth Hobgood in 1815.

The proofs, on the part of the defendant, were, possession of the land by William Pannill from 1803 to 1806, when it was sold, under a judgment and execution, to John Washington,

and possession by the said Washington until his death in 1826, a devise of the said land from Washington to his wife, and a possession by her until she sold it to the defendant; and that these several parties, during the periods covered as aforesaid by their titles, had possession of the premises, claiming them as their own property.

Hezekiah Hobgood, after the death of his wife in 1843, left the State, and had not been heard of since.

Upon the trial the case turned upon the questions of fact, whether Mary Hobgood, now Mary Taylor, was of full age when she married on 7th of January, 1842, and if so, whether her right of entry was such as to cause the bar of the statute of limitations to operate against her. The plaintiff's counsel contending that, according to the proofs, she was under age at her marriage.

2nd. It was contended for the plaintiff that, as Washington was guardian of Elizabeth Hobgood, the law would *construe* his possession (whatever may have been his intention and purpose) as a holding in behalf of, and for the benefit of his ward.

On the 23rd of May, 1802, William Pannill and John Walker entered into a written obligation, under seal, in which it was recited that the said John Walker had sold the land, in question, to Wm. Pannill, for a certain price, reserving possession till the 25th of Dec., 1803, and it was agreed that Pannill was to deliver in payment a bond which he held on Walker, likewise a bond on Thomas Potter, and another bond on Robert Potter, and was to pay the remainder of the price as soon as a good and lawful deed was made to the said Pannill, and possession surrendered to him.

Wm. Pannill filed a bill in Equity, in the district of which Granville county was a part, against the heirs-at-law of John Walker, who was then dead—setting forth this obligation—alleging the delivery of the bonds, and praying a conveyance on the payment of the remainder of the purchase-money, according to the terms of the written contract between them.

The bill was answered by the heirs-at-law, through their

guardian, *ad litem*, and subsequently, by Thomas Potter, the administrator of John Walker, and from the answer of the latter, it appearing that all the purchase-money had been paid, and the allegations of the bill being admitted by the other defendants, a decree was made in the said Court of Equity, ordering the said heirs-at-law, as they might come of age, to make title to the premises to the said Wm. Pannill, in fee simple.

The introduction of this record of the Court of Equity was objected to as immaterial, but was admitted by the Court, for the purpose of showing the nature of Pannill's and Washington's possession. To this the plaintiff excepted.

The Court left it to the jury to say, 1st, whether Mary Taylor was of full age when she intermarried with the male lessor of the plaintiff; and 2ndly, whether during the whole period of the coverture between Hezekiah and Elizabeth Hobgood, there had been an adverse possession in Washington and wife, under color of title?

And he instructed them, if there had been an adverse possession of the land, under color of title, at the intermarriage of Hezekiah and Elizabeth Hobgood and since, the husband would acquire no right, by the curtesy, after his wife's death, and, therefore, in that case, if Mary Taylor was of age at the time of the intermarriage, she would be barred by the statute of limitations; otherwise, the jury were instructed to find for the plaintiff. Plaintiff excepted to these instructions.

Verdict for the defendant. Judgment and appeal by the plaintiff.

Winston, Sen., for the plaintiff.
B. F. Moore and *Jenkins*, (*Att. Gen'l.*) for defendant.

Pearson, J. The effect of the contract of sale by Walker to Pannill, was to make Walker a trustee to secure the purchase-money, and then in trust for Pannill. By the death of Walker, the legal title descended upon his heirs-at-law, upon the same trusts. By the payment of the purchase-money to

the administrator of Walker, the first trust was discharged, and the heirs held the legal title simply in trust for Pannill, all wich is declared in the decree, which, with the pleadings, makes a part of the case. By it the heirs are directed to make title to Pannill upon their arrival at full age, unless cause be shown against it, &c. The heirs have never made a conveyance, and the question is whether Pannill, or those claiming to stand in his place, have, in any way, devested the title out of them? The relation between the heirs of Walker and Pannill was that of trustee and *cestui que* trust, by *agreement of the parties*. So, Pannill's possession, for no length of time, could devest the title of *his trustee*, for the simple reason that it could not be adverse. This is settled in *Taylor* v. *Dawson*, 3 Jones' Eq. Rep. 86. Washington became the purchaser of Pannill's interest in 1806, at execution sale, went into possession, and continued in possession until his death, in 1826. We will put out of the case the fact that, in 1815, Washington was appointed guardian of Elizabeth, one of the heirs, who afterwards married Hobgood, for if his becoming guardian does not prejudice his claim, it certainly does not aid him in an attempt to defeat his ward's estate, and usurp her title.

Washington purchased before the act of 1812. The trust estate of Pannill was not then subject to be sold under execution, and the utmost right which he could set up under his purchase, was to have the possession of Pannill, which we admit he could have recovered in ejectment from Pannill, the defendant in the execution, and in equity he was entitled to be substituted to the rights of the creditor, whose debt he had paid, and thereby succeeded to the equity of Pannill to the extent of holding it as a security for the money which he had paid. So we see that Washington's interest was an emination, or an equity growing out of the equity of Pannill, and as the latter could not, by any length of possession, devest the title of his trustee, of course Washington could not do so.

This disposes of the case, even if we make the supposition that, after the death of Washington, the possession of the de-

visee and her alienee were adverse. For as Washington's possession was not adverse, Hobgood, upon his marriage, and the birth of a child, and the death of his wife, became tenant by the curtesy of the legal estate, and her heir had no right of entry until his death. He was certainly alive in 1843. Mary Hobgood, now Mary Taylor, the lessor, married in 1842; she was, consequently, under coverture when her right of entry accrued, and is still so.

From the view we have taken of the case, it is unnecessary to decide an interesting question of evidence, which was presented on the trial.

PER CURIAM. Judgment reversed, and a *venire de novo*.

STATE *v.* JOHN W. SHAW.

Although being found in the possession of stolen goods, after a certain length of time, does not create a presumption of the possessor's guilt, yet, it is a fact that may be considered by the jury, with the other facts of the case.

Acts which would constitute *aiding and abetting* in grand larceny, will justify a conviction for petit larceny, when that is charged.

If a Judge charges substantially according to law, it is sufficient.

THIS was an INDICTMENT for PETIT LARCENY, tried before SAUNDERS, Judge, at the last Rockingham Superior Court.

There were several witnesses examined in support of the prosecution. The prosecutor, *Isaac Thacker*, said that he had the bar of iron in his shop on the 20th of November; that it was then about nine feet long; that on the next morning (21st,) it was missing; that he had a white man and four slaves at work in the shop; that he found the iron on the 13th of December; that witness claimed the iron, when defendant said it was his own, and that he had bought it from Rankin and McLean, that fall twelve months before. Prosecutor returned on the next day, with a magistrate, and swore to the iron, which was then but four feet long, with a mark of "W.

J. Mc." on it; that he had purchased the iron of William J. McConnell. Defendant, on this occasion, again asserted that the iron was his, and that he had got it from Rankin & McLean. A week after that, he told the magistrate that he had got the iron from Wm. J. McConnell.

Another witness swore that defendant told him he got the iron from Bell.

Wm. J. McConnell testified that he had let the prosecutor have iron of that description, but had not let the defendant have any.

Rankin testified that he had no recollection of letting the defendant have any such iron.

The counsel for the defendant insisted that, according to the case of the *State* v. *Williams*, the finding of stolen property after twenty days from the time it was stolen, in the possession of any one, raises no presumption of guilt, and asked the Court so to charge.

The solicitor admitted the principle, but argued that the *finding* was a fact to be considered by the jury, with the other circumstances of the case.

The Court charged the jury "that the State had first to prove that the iron had been lost, and stolen by some one.

"*Secondly*, that the iron found in the possession of the defendant was that of the prosecutor; that if the evidence failed to satisfy them of the loss, identity, and taking of the iron, or either of them, their verdict should be for the defendant; that the State was bound to satisfy them that the defendant had, himself, taken the iron, or procured it to be done; that the defendant's counsel said there was no evidence of this, and if the jury believed he got the iron from Bell, or the negroes, he could not be convicted; that there was no direct evidence, either of the procuring, or of the getting from any other person; that as the iron was found in the possession of the defendant more than twenty days after it was lost, this was no evidence, in itself, of guilt, but might be considered as a fact, in connection with other circumstances, such as his having made different statements in relation to the iron, and from

whom he got it—that is, if he had made such statements; that the cause had been argued at great length, but the testimony was simple and in a nut-shell—had the loss and identity been proved?—did the defendant steal the iron, or procure it to be done? or had he got it of another after it had been taken? that if he stole the iron himself, or procured it to be done for him, they would convict: that if he received the iron from another who had stolen it, knowing it to be stolen, they would acquit; on this they would determine from the whole testimony in the cause."

The counsel, for the defendant, asked the court to charge as to rational doubt.

In reply, his Honor said "this was not a case of murder, still the jury should be satisfied, to a reasonable certainty; the jury could not balance the testimony, and say which scale preponderated; the State had to prove the defendant guilty; otherwise he was entitled to an acquittal." Defendant excepted.

Verdict, "guilty." Judgment; and appeal by the defendant.

Attorney General, for the State.
McLean and *Bailey*, for the defendant.

Nash, C. J. We see no error in the charge complained of. The defendant is indicted for petit larceny. Several exceptions were taken to the charge. First: The Court was asked to instruct the jury that twenty-three days having passed, between the time of the iron being missing, and the finding it in the possession of the defendant, the law raised no presumption that the defendant had stolen it. The case stated that this was admitted by the State, but it was claimed that the circumstance of the finding was a fact to be considered by the jury, with the other circumstances. The latter part of the exception, that the finding was left to the jury, by the court, as a fact, is not complained of; but the defendant complained that his Honor said nothing about the presumption. It was not necessary. The State, by its officer, admitted that the finding, after such a lapse of time, created no presumption in law of the stealing

by the defendant. The point of law was not controverted, and therefore, did not require a specific charge. The second exception is substantially embraced in the first. As it was admitted, that from the circumstances, no presumption arose against the defendant by reason of his possession, we cannot perceive the propriety of his Honor being more precise than he was, nor can we see that more precision would have benefited the defendant. The fact was left to the consideration of the jury, who alone would judge of its bearing and effect

The third exception is upon the subject of rational doubt. In the charge, the jury were instructed that this was not a capital felony, but that the State was bound to satisfy them that the defendant had himself taken the iron, or procured it to be done. In immediate response to the prayer, his Honor told the jury the testimony was simple and lay in a nut-shell; and after calling the attention of the jury, in a summary manner to the evidence, concluded by saying this was not a case of life and death, and that the jury ought to be satisfied, to a reasonable certainty, of the defendant's guilt. In the argument some criticism was indulged in, as to the meaning of the words, "reasonable certainty." The terms are evidently used, in contradistinction, to absolute certainty. If the charge of a Judge is to undergo grammatical criticism, he is entitled to any benefit to be derived from it. What is "certainty?" Mr. Walker says "certainty is being free from doubt"—reasonable certainty is the being free from reasonable doubt. The Judge did charge substantially, as asked for. It has been repeatedly decided by this court, and during this term, that a Judge is under no obligation to use the language of the counsel in replying to a required charge, provided he does it substantially. In his charge, the Court instructed the jury, that "the State was bound to satisfy them, that the defendant had taken the iron himself, or procured it to be done." It was objected by the defendant's counsel, that there was no evidence to show that he had procured it to be done. Without investigating the evidence to see whether there was no evidence upon that point, it is sufficient to say, that if there was none, it cannot

affect the decision of the case. In petit larceny, there are no aiders and abettors; all are principles, who are concerned in the felony; whether therefore, the defendant took the iron himself, or procured another to do it for him, he was alike guilty. The charge, in the indictment, is that he stole the iron, and there can be no doubt, that proof, that he procured it to be done, would have sustained the charge. It was perfectly immaterial in which way the felony was perpetrated; and the charge in this particular, was intended to show the jury that fact. For this reason, it cannot be said, justly, that the Court charged the jury upon a hypothetical case. It is also said that the Judge violated the act of 1796—directing the manner in which a Judge should deliver his charge. The expression that the case lay in a nut-shell, is as enigmatical as to whom the victory in the contest belonged, as was the Delphic reply to Pyrrhus when seeking to know if he would be successful in his contemplated war with Rome; the answer was "a mighty empire will be subdued." No one could tell, from the expression, that the Judge thought the defence was successful, or that it had failed.

There is no error; and this opinion will be certified to the proper court.

PER CURIAM. Judgment affirmed.

D. CUTHBERTSON, *et. al. v.* HENRY LONG, *Executor.*

Where J. L. agreed to make good to the plaintiffs, certain sums, which they had paid as sureties for his son, out of that part of his estate which his said son would be entitled to at his (J. L's) death, and covenanted, by deed, to pay such claims as said sureties could *produce on or before the death* of J. L., in a suit brought against the executor of J. L., it *was Held* that it was not necessary to show that the sureties had exhibited their claims to J. L. in his life-time.

Cuthbertson *v.* Long.

This was an action of DEBT, tried before his Honor, Judge Dick, at the Spring Term, 1857, of Union Superior Court.

The action was brought on the following bond:

"State of North Carolina, Union County:

Know all men by these presents, that we, John Long and Jacob Long, are held and firmly bound to David Simpson, and David Cuthbertson, in the sum of four hundred dollars, to be paid to the said Simpson and Cuthbertson, their heirs and administrators, and to the which payment, &c.; The conditions of the above obligation is as such, that David Simpson and David Cuthbertson, has paid money for John Long as security, on sundry bonds, and sundry executions, we, John Long and Jacob Long, are held and firmly bound unto D. Simpson and D. Cuthbertson, to pay all the just claims, receipts, and executions, that they can produce, on, or before the deathof Jacob Long, to be paid out of John Long's distributive share of his father's estate."

The claims existing between the parties, had been referred to an accountant to state the debts, and monies secured by the bond, with the testimony. The account was stated, and no exceptions filed, whereby it appeared that the amount paid by the plaintiffs, for John Long, was $278,58.

This statement was put in without exception from the defendant. But it was insisted, that according to the true and proper construction of the instrument above set forth, the plaintiffs should have shown that the claims, receipts, and executions, taken into that account, and now insisted on, had been produced to Jacob Long, in his life-time.

His Honor declined giving that construction to the instrument, to which defendant excepted.

Verdict for plaintiff. Judgment. Appeal by defendant.

Osborne and *Jones*, for plaintiff.

Wilson, for the defendant.

Nash, C. J. The action is brought on a conditional bond. The condition is as follows: "The conditions of the above

obligation is such, that David Simpson and David Cuthbertson, have paid money for John Long, as securities on several bonds and sundry executions; we, John Long and Jacob long, are held and firmly bound to the said D. Simpson and D. Cuthbertson, to pay all the just claims, receipts or executions, that they can produce, on or before the death of Jacob Long, to be paid out of John Long's distributive share of his father's estate. Signed, "John Long," "Jacob Long," each with a seal attached. The case states that the plaintiffs had paid, as sureties, before the death of Jacob Long, the sum of $278,58.

The only question which is presented to us is, as to the proper construction of that portion of the condition which relates to the production of their just claims, receipts and executions, on or before the death of Jacob Long, the father of John Long, of whom the defendant, Henry Long, is the executor. From a part of the case, it appears that the defence below was rested on the fact, that these evidences of debt, were not produced to Jacob Long before his death.

His Honor instructed the jury, that the plaintiffs were entitled to recover from the defendant all sums of money which they had paid for John Long, as his sureties, before the death of Jacob Long. In this construction of the obligation, we entirely concur. There is nothing in the instrument, showing that these evidences of payment were to be produced to Jacob Long during his life. The true meaning was, that Jacob Long was to repay to the plaintiffs all such money as they should pay for his son John, during his (Jacob's) life. He was not willing to bind himself for payments made after his death.

Per Curiam. Judgment affirmed.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1857.

STATE *v.* JAMES MOTT.

The Act of 1846, concerning attachments for contempt, (Rev. Code, ch. 34, sec. 117,) by which the Court is required to have the particulars of the offense specified on the record, gives no right of appeal, nor to a writ of certiorari, in such cases.

APPEAL from an order made by his Honor, Judge ELLIS, at the Fall Term, 1856, of Caldwell Superior Court, committing the defendant for a contempt.

The order appealed from is in these words, viz:

"James Mott is ordered by the Court to be imprisoned till nine o'clock on to-morrow morning, for a contempt of Court, by making a loud noise within the hearing of the Court, and to the disturbance of the same, and offering resistance while under arrest, in the presence of the Court."

From this order the Court allowed the defendant to appeal.

Attorney General, for the State.
Gaither, for the defendant.

Nash, C. J. The defendant, for a contempt of Court, was ordered into custody and sentenced to imprisonment until nine oc'lock the succeeding morning; from this judgment he was permitted to appeal to this Court. The power of the Court, at common law, to punish for a contempt, is not questioned, and it is also admitted, that by the law, as it existed previously to the act of the General Assembly, passed at its session of 1846, no right of appeal existed; but it is contended that the Act of 1846, requiring the particulars for which the party is punished, to be spread upon the record, authorises the appeal. We do not so think. For good reasons, the law does not authorise an appeal in such cases. To constitute a contempt, the act done, must be in the presence of the Court, or so near thereto, as to obstruct the administration of justice. From the nature of the offence, it is difficult to perceive, how another Judge can estimate the nature of the act. The evil requires prompt action to its removal. Let us suppose a case: A man comes into Court, and by his noisy behavior obstructs the business; the Judge orders him to be fined and imprisoned for the contempt; the delinquent appeals to the court above; the appeal, of course, annuls the judgment; but the individual remains in the court-house, and still continues his disorderly conduct; the court again interferes by a judgment of fine and imprisonment; and again, the right of appeal is interposed; and so on, as long as the obstinacy and folly of the trespasser continues; to the entire suspension of the public business, and in utter contempt of the judicial authority.

The whole of this doctrine is fully examined in *ex parte Summers*, 5 Ire. Rep. 149, in which the Court decide that, the only way in which an error in judgment in the Judge below, in the application of the doctrine of contempt, can be remedied, is by a writ of *habeas corpus*, and that the intruder is not entitled to a writ of certiorari. In the case of the *State* v. *Woodfin*, 5 Ire. Rep. 199, the Court decide, that from the nature and necessity of the case, there can be no trial *de novo* in another Court as to the truth of the fact. These decisions

were made in 1844, and we have seen the act requiring the facts to be spread upon the record, was passed in 1846. It is asked, for what purpose was it required, if not to enable a revising Court to correct any error that might have been committed? The object was to furnish evidence against a magistrate, on a trial for a malfeasance in office, by an abuse of power, and to enable the person, punished, to obtain such redress, as, by the law, he might be entitled to; but the act makes no provision for an appeal, or for obtaining a writ of certiorari. It would be doing great injustice to the members of the Legislature of 1846, to suppose them ignorant of the two decisions made by this Court, which are above referred to. They knew, therefore, as the law stood, a person committed for a contempt, had no right, either to appeal, or to a certiorari. It would be strange then, if these decisions were deemed erroneous in those particulars, or that the law, as so declared, was unjust and oppressive on the citizens, and needed alteration in that respect, that the right of appeal, or to the writ of certiorari, was not given. But the law was wisely left by the Legislature, in these particulars, as they found it.

The only error in the Judge below was, in allowing the individual to appeal. It is unnecessary to express an opinion as to the sufficiency of the facts, stated in the record, as constituting a contempt of Court, or as substantially complying with the provisions of the act of 1846. The appeal is dismissed.

PER CURIAM. There is no error.

Den on dem. of B. B. EDMONSTON *v.* WILLIAM SHELTON.

Where it was left uncertain whether a possession (relied on to defeat an elder title) began in *February* or *March*, which was insufficient, in law, if it began in the latter month, but good, if in the other, *Held* that the party alleging such possession, was bound to show in which month it began, or he could take no benefit from it.

ACTION of EJECTMENT, tried before ELLIS, Judge, at the Fall Term, 1856, of Jackson Superior Court.

The plaintiff showed title in himself, by the production of a grant from the State, for the land in controversy, bearing date 14th of August, 1843. He showed the defendant in possession at the time of the service of the declaration.

The defendant, to show title in himself, produced a grant for the same land, dated six days after the date of the plaintiff's grant, to wit: on the 20th of August, 1843. He then undertook to show an adverse possession, under this grant, for more than seven years; to do so, he showed that he owned another tract of land, called the Cathey tract, adjoining the one in question, which he cultivated; that the land, sued for, was uncultivated, and laid in a wild region of the mountains: that in February, or March, 1847, defendant built a shed on the same, near the line of the Cathey tract; that this structure was of puncheons driven upright in the ground, against which other puncheons were leaned, so as to form a shed, or roof; that during the year 1847, the defendant frequently went to cultivate the Cathey tract, which was distant several miles from his residence, and that when there, he occasionally *camped* or *tented* in this shed, and when he had worked over his crop, he returned home, and left it vacant; that in December of that year, (1847,) some of his cooking implements were found there; that hunters and others, as they traversed the mountains, were in the habit of camping under this shed, it being constantly left open for all who might choose to occupy it. It was proved that there was also a small enclosure near the camp, of about twenty pannels of fencing, in which the defendant occasionally salted some cattle which he had running in the mountains. There were no other improvements of any kind on the land in 1847, and no uses whatever were made of the premises, except those above stated. The plaintiff's declaration issued in February, 1854, and the question was whether the acts of occupation and enjoyment above stated, accompanied, during the time, with a claim of right, was sufficient to ripen this younger, and defective title, so as

to defeat the plaintiff's elder title.

The Court was of opinion that it was not, and so instructed the jury. To which the defendant excepted.

Verdict for the plaintiff. Judgment; and appeal by the defendant.

Baxter, for plaintiff.
J. W. Woodfin, and *Gaither*, for defendant.

Nash, C. J. The defendant makes title under the statute of limitations. His paper title is defective; in other words, the plaintiff's title is the preferable one, unless he has, by permitting the defendant to remain in the adverse possession of the premises, until his title has been ripened into an indefeasable one so far as the plaintiff is concerned. The time is, by our statute, seven years. The defendant took possession of the premises, in dispute, by erecting the shed in February or March, 1847. In order to make out his possession for the time required to ripen his title, it was necessary for him to show that he took possession in February. The case states that he took possession in February or in March, 1847. This alternative time will not answer—the law ripens the defective title of the possessor only after a seven years' possession before the commencement of the action, to be calculated from the time when he went into the possession, the *onus* being on him, thereby giving to the rightful owner an opportunity to try the title by an action of ejectment. Here the defendant needs one month to make out his full time. The Court cannot depart from the law, and say that a less time, than that established by the act, shall suffice. If we can say six years and eleven months will answer, with equal propriety, we can say six years and six months will, or any less time will. The Legislature makes the law, our business is to expound it.

Per Curiam. There is no error. Judgment is affirmed.

Den on dem. of WILLIAM REID *v.* JOHN LARGENT.

A purchaser at sheriff's sale is not bound to see that the sheriff sold on the proper day in the week, nor can he be made to lose the benefit of his purchase by an irregularity of this kind.

THIS was an action of EJECTMENT, tried before CALDWELL, J., at the Spring Term, 1857, of McDowell Superior Court.

The lessor of the plaintiff, in making out his chain of title, relied on a sheriff's deed, executed by one Curtis, who had made sale of the land, in controversy, as sheriff, and his return showed that the sale was made "on Wednesday 28th of January, 1846." It did not appear, from the said return, that the land had been offered on Monday and postponed from day to day; nor was there any evidence offered to show that such was the fact. The defendant objected to the reception of the deed; but it was admitted by the Court, and the defendant excepted.

Verdict for the plaintiff. Judgment; and appeal by the defendant.

Avery, for plaintiff.
T. R. Caldwell and *Baxter*, for the defendant.

NASH, C. J. This case is, in the principle decided, covered by that of *Mordecai* v. *Speight*, 3 Dev. 428. It was there adjudged, that it would be dangerous to purchasers, and ruinous to plaintiffs in executions, to require bidders at a sheriff's sale, to see that the officer has complied with all his duties in making the sale. In that case, the sale was not opened on Monday, the sale day, but was postponed, until Tuesday, when it took place. His Honor, below, instructed the jury, that as the sheriff's sale, did not commence on Monday, the return day of the writ, his authority to sell expired with that day, and that a sale made by him, on Tuesday, was void. The Supreme Court reversed the judgment for error. In *Pope* v. *Bradley*, 3 Hawks' Rep. 16, cited and approved in *Mordecai*

v. *Speight*, the Chief Justice in delivering the opinion of the Court says, "that on no principle could an irregularity in the adjournment, annul the sale; upon the ground, that the act was directory to the sheriff, and gives a penalty against him." Here the sale was on Wednesday of Court, after the return day.

PER CURIAM. There is no error, and Judgment is affirmed.

THOMAS B. GUNTER *v.* MOSES WATSON.

The rule of evidence, forbidding the counsel in a cause to ask a witness on his side, leading questions, may, under certain peculiar circumstances, be relaxed, or altogether abandoned, at the discretion of the presiding Judge. The exercise of this discretion cannot, ordinarily, be appealed from, but when its effect is to deprive the party of competent testimony, an appeal is allowable.

One of the circumstances, authorizing such departure, is where one witness is called to contradict another, in which case, the interrogatory may be permitted to embrace the language proposed to be contradicted.

THIS was an action of ASSUMPSIT, for the price of a mule, tried before BAILEY, J. at the Fall Term, 1856, of the Superior Court of Jackson County.

The plaintiff, in order to show that he had sold the mule in question, to the defendant, introduced one James Carrol, who swore that he heard the defendant say he had bought the mule from the plaintiff, and that Thomas J. Ogle was present.

The defendant, to contradict witness, Carrol, produced the deposition of Thomas J. Ogle, who resided in the State of Tennessee, in which the witness states that he heard the contract between the parties, and that the defendant hired the mule of the plaintiff. The defendant, after several other interrogatories, asks the following question: "Did you hear me

tell James Carrol that I had bought the mule?" To which the witness answered that "he did not."

The plaintiff's counsel objected to the answer as being in reply to a leading question.

The Court excluded the answer, and the defendant excepted.

Verdict for the plaintiff. Judgment; and appeal by the defendant.

Gaither and *Jos. P. Jordan*, for the plaintiff.
Baxter, for the defendant.

Battle, J. Among the rules which have been adopted by the courts, for the regulation of jury trials, none are of more importance than those which relate to the examination of witnesses:

The object of these rules is to permit all the testimony, material and pertinent to the issue, to be fairly and fully brought out, and at the same time to prevent it from being perverted, misrepresented, or falsely colored. One of the most common of the preventive rules is that which prohibits the counsel of a party from putting leading questions to his own witness. A leading question is one which suggests to the witness the answer which the party desires; or, which is so put as to embody a material fact, and to admit of an answer by a single negative, or affirmative; though neither the one, nor the other, is directly suggested. Such questions are prohibited, because the witness is supposed to be, and often is, favorable to the party who calls him. 2 Phil. on Ev. 401. Under certain peculiar circumstances, the rule may be relaxed, or altogether abandoned, at the discretion of the presiding Judge; and from the exercise of his discretion there is, ordinarily, no right of appeal. But there are cases in which, if the party be deprived of the benefit of material testimony to which he is entitled, he may complain of it as error, and have it reversed upon appeal. Such, we think, is the case now before us. The testimony was contained in a deposition

—was pertinent to the issue, and was very important to the party who offered it. When the question was objected to, on the trial, he could not get the benefit of an answer by varying it in such a way as to divest it of its objectionable character. The adverse decision of the Judge, therefore, deprived him of the benefit of the witness's answer. If that decision were not in accordance with the established practice, he has manifestly been prejudiced by it, and ought to have redress. It becomes then necessary for us, to examine whether there is any settled rule of practice in such cases, and if so, how it affects the present case.

The general rule is admitted, and has already been stated, to wit, that the counsel of a party cannot put leading questions to his own witnesses. It has also been stated that, under certain circumstances, the rule may be departed from. The departure from the rule, as well as the rule itself, is intended to secure a full and fair examination of the witnesses, so as to extract from them all the testimony which they are capable of giving, free from bias, partiality, and false coloring. One of the circumstances, under which a departure from the general rule is allowable, is, when it becomes important to contradict a witness who has been examined by the opposite party. This may be illustrated by the case of *Courteen* v. *Tallse*, Camp. N. P. Rep. 43, in which one of the witnesses of the plaintiff, having been cross-examined as to the contents of a letter received by him from the plaintiff, (the letter having been lost,) and having mentioned in his cross-examination some particular expressions as part of the contents, witnesses were called on the part of the defendant, to speak of the contents of the same letter, and Lord Ellenborough allowed the defendant's counsel to ask one of the witnesses, who had first stated all he recollected of the letter, whether it contained the particular words and expressions as represented by the plaintiff's witness. Mr. Phillips, in commenting upon this case, says that "here, the object of cross-examining, was to ascertain a material fact in the case, by means of the plaintiff's letter; and as the plaintiff's witness

had stated what he conceived to be the language of the letter, and the defendant's witness, on the other side, had given his account of its contents, it then became perfectly reasonable to allow the question, whether the letter contained particular expressions, as represented by the witnesses on the other side, or any to that effect." Lord Ellenborough, holding that "after exhausting the witness' memory, (not however, by leading questions, but by examining him in the regular manner,) the witness might then be asked whether it contained a particular passage, recited to him, which had been sworn to on the other side, for otherwise it would be impossible ever to come to a direct contradiction." See 2 Phil. on Ev. 406.

Let us see how the rule, thus laid down, will apply to the present case: The main question, in issue between the parties was, whether the defendant had bought, or only hired the mule, for the value of which the suit was brought; *James Carrol*, a witness for the plaintiff, had sworn that he had heard the defendant acknowledge, in the presence of one Thos. J. Ogle, that he had bought the mule of the plaintiff. The defendant then introduced the deposition of the said Thomas J. Ogle, who, to a question properly put, testified that he heard the contract between the parties, and that the defendant hired the mule of the plaintiff. The defendant after several other interrogatories, put one in the following form: "Did you hear me tell James Carrol that I had bought the mule?" The interrogatory was objected to by the plaintiff's counsel, and the Court refused to permit the answer to it to be read to the jury. It seems to us that the question, thus put, was, under the circumstances, a proper one, and that the answer to it ought to have been received. We cannot distinguish it from that which was decided to be proper by Lord Ellenborough, and for which he gave so conclusive a reason—"that otherwise it would be impossible ever to come to a direct contradiction." For the error in rejecting this testimony, the judgment must be reversed, and a *venire de novo* awarded.

Per Curiam. Judgment reversed.

Den on the demise of ELIJAH CHASTEEN *v.* WILLIAM PHILLIPS.

A purchaser at a sheriff's sale under a *venditioni exponas*, is not bound to show any thing in relation to the disposition of property, which had been levied on under the previous execution.

A levy, endorsed on a justice's execution, as being made "on three tracts of land, containing three hundred acres, on Caney Fork," is not sufficiently definite to comply with the requisites of the Act of Assembly.

Facts, merely collateral to the description contained in a levy endorsed on a justice's execution, cannot be adduced to extend, or help out, an insufficient description of the land levied on.

ACTION of EJECTMENT, tried before MANLY, J., at the Fall Term, 1855, of Macon Superior Court.

The lessor of the plaintiff claimed title through a person by the name of Leonard Higdon, and showed a regular conveyance from him.

The defendant claimed the same land by virtue of a sheriff's sale, under a *venditioni exponas*, founded on certain levies, made by a constable under justices' judgments and executions. A judgment had been rendered against Leonard Higdon and William Higdon, by a justice of the peace, upon which an execution issued, on which was entered the following levy, viz: "Levied this execution on twenty head of hogs, and ten head of sheep, and all of L. Higdon's standing crop of corn, wheat, and rye, and three tracts of land, containing three hundred and sixty acres, on Caney Fork." A venditioni issued from the County Court, for the sale "of three hundred and sixty acres of land, in three tracts, lying on Caney Fork, taken as the property of Leonard Higdon and William Higdon." The land in question, was sold by the sheriff to one Allison, who conveyed the same to the defendant. The defendant proved that the personal property ,levied on, was sold prior to the order of court for the writ of venditioni exponas; but how the money was applied, did not appear. This evidence was objected to, but received by the Court, to which plaintiff excepted.

In aid, and in explanation of the above description of the land, witnesses were introduced, who stated that one of the tracts, levied on, was well known in the neighborhood as the property of Leonard Higdon, and was his residence; that it was on the waters of Caney Fork, and that said Higdon had no other land in the county; that there was no person's land adjoining it, except a large grant to a speculating company, unknown to the witnesses; and that the land would be as well known by the description in the levy, as by any other, and as well known as if described according to the requisitions of the statute. The same witnesses proved that Caney Fork was a creek some fifteen miles long; that there were two persons settled near the land in question, but not on adjoining tracts, and that a smaller creek, a tributary of Caney Fork, ran through the land.

The plaintiff contended that the evidence offered to show that the land was as well known by the description adopted, as it would be by that required by the statute, was insufficient in law to establish the point, and he objected to it also, as being the opinion of witnesses, not supported by facts.

The plaintiff, also contended, that the orders of sale, by the County Court, were not valid, because it did not appear, by the return of the officer, what had been done with the personality levied on.

The Court left the point of the sufficiency of the proofs to identify the land to the jury, as a question of fact, in connexion with the levy above set out. He read this description to the jury, and then informed them what the statute required, and directed them to inquire whether this description "is as certain (i. e. locates the land as definitely) as that required by the statute would be."

His Honor, charged that the objection to the validity of the venditioni exponas, was not sustainable. Plaintiff excepted to the charge.

Verdict for the defendant. Judgment; and appeal by the plaintiff.

Baxter, for the plaintiff.
N. W. Woodfin, and *Gaither*, for defendant.

Pearson, J. The levy, (supposing it to be sufficient), and return of the executions, gave the County Court jurisdiction, so as to make applicable, the rule, *omnia presumuntur rite esse acta*, in favor of a third person, who is a purchaser under the sheriff's sale. The *venditioni exponas*, gave the sheriff power to sell. If the sale, made under it, could be treated as a nullity, by reason of a supposed irregularity in not setting out, either upon the record of the County Court, or in the venditioni exponas, what disposition had been made of the personal property levied on, all prudent persons would be deterred from bidding for land at sheriff's sale. Accordingly, it is established, by several decisions of this Court, to be against public policy to require persons, who are not parties to the proceedings, to see, at their peril, that all the preliminary proceedings have been taken, and duly set out; such as notice to the debtor—advertisement by the sheriff—a regular postponement of the sale, where it is made on any day of the return term other than Monday—that the debtor had no goods and chattels, or that the goods and chattels, levied on, had been otherwise duly disposed of. *Jones* v. *Austin*, 10 Ire. Rep. 20; *Reid* v. *Largent*, ante, 454.

In regard to the sufficiency of the description of the land, set out in the levy, we do not concur in the view, taken by his Honor. The statute requires that the levy should specify the land, "where situate—on what water course, and whose land adjoins." *Huggins* v. *Ketchum*, 4 Dev. and Bat. Rep. 414; *Smith* v. *Low*, 2 Ire. Rep. 457, and other cases, decide that the precise mode of description, used in the statute, need not be pursued, but that any other mode of description will answer, provided the land is as clearly *identified by it*, as it would be if the description required by the statute, had been given; for instance, the debtor's *home place*, or *Lynn place*. This departure is permitted, on the ground, that the object of the statute, in requiring a description, being to inform the

sheriff what land he was to sell, and to enable bidders, and other persons, to know what land was offered for sale, may be as well effected by other modes of description, as that indicated in the statute; and, consequently, another mode of description will suffice, provided the land is thereby as well identified.

The description, made in the levy in this case is, "three tracts of land, taken as the property of Leonard and William Higdon, on Caney Fork, containing three hundred and sixty acres." This description is as vague and indefinite as could well be; it describes no specific land—does not even say whether the three tracts are in detached parcels, or adjoin each other—or how much each contains. Several witnesses swear, that one of the tracts was well known in the neighborhood, as the property of Leonard Higdon—was *his residence*, and that he owned no other land in the county, and they conclude, "that the land would be as well known by the description in the levies, as by any other, and as well known as if described according to the requisitions of the statute." This conclusion could not be established by the oath of fifty witnesses; for the simple reason, that it is impossible for it to be true.

The witnesses, and his Honor, in the Court below, fell into error by not distinguishing between that which is *a part of the description*, and that which is merely *evidence of a collateral fact*. If the description had contained these additional words, "one of the said tracts, being the residence of Leonard Higdon, and the other two tracts, adjoining the same," then the facts, stated by these witnesses, would have established the truth of the conclusion; but without this addition to the description, the fact, that Leonard Higdon resided on one of the tracts, was simply collateral, and the insufficiency of the description could be in nowise aided by it. How could that fact enable the sheriff to tell what land he was to sell, or enable bidders, or other persons, to know what land he was selling? They had to be governed by the description set out in the levy, and that, as we have seen, was too vague and indefinite to identify any land.

If, although the description in a levy is not sufficient, a sale under it can be made good by proof of facts which are not set out as part of the description, the effect will be to defeat the operation and purposes of the statute, and allow land to be sold without the safe-guards which the Legislature has provided against fraud and surprise. *Philipse* v. *Higdon*, Busb. Rep. 380.

The Court erred in leaving "the point, as to the sufficiency of the proofs to identify the land, to the jury as a question of fact," and the plaintiff was entitled to the instruction asked for, "that the evidence was, in law, insufficient to establish that point," because there was no part of the description to which the evidence was applicable. In directing the jury to inquire "whether *this description* is as certain, (i. e. locates the land as definitely, as that required by the statute,") his Honor, evidently, confounds the *description in the levy*, with the *proof* offered in regard to matter, to which no part of the description referred. *Venire de novo.*

PER CURIAM. Judgment reversed.

STATE *v.* SAMUEL BOON.

In an indictment for cheating by false tokens, in obtaining an article of property from a person by means of a counterfeit piece of coin, to wit, a counterfeit quarter of a dollar, it is not material to aver to what currency the coin, intended to be counterfeited, belonged.

Nor is it necessary to aver that the spurious coin used, was made like the one alleged to be imitated, the word "counterfeit" being a sufficient allegation of that fact.

Where the indictment charged that the article was obtained by means of a false coin, it was not necessary to aver, that this was done by *passing* it.

Nor, in such an indictment, is it necessary to allege the value of the thing obtained, or to aver that it was of any value, if it be a thing recognised as *property*.

Nor is it necessary to aver that the thing obtained, was the property of the person from whom it was alleged to have been obtained.

If the last objection had been otherwise good, it would have been obviated by the statute; Rev. Code, ch. 35, sec. 14.

THIS was INDICTMENT for CHEATING by false tokens, tried before CALDWELL, Judge, at the Spring Term, 1857, of Yancy Superior Court.

The indictment was as follows:

"The jurors for the State, upon their oath, present, that Samuel Boon, late of the county of Yancy, being an evil disposed person, and wickedly designing, and intending to cheat one Mary Wilhite, on the 18th day of October, in the year 1856, with force and arms, at, and in the said county knowingly and designedly, by means of a certain false token, to wit, by means of a quarter of a dollar, which the said Samuel well knew to be counterfeit, did, then and there, obtain from the said Mary Wilhite, one piece of gingerbread, with intent to cheat and defraud the said Mary Wilhite, against the form of the statute, in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said Samuel Boon, on the day and year aforesaid, with force and arms, at, and in the county aforesaid, feloniously, knowingly, and designedly did obtain from the said Mary Wilhite, by means of a false token, to wit, by means of a counterfeit quarter of a dollar, which the said Samuel Boon well knew to be counterfeit, one piece of gingerbread, with intent to cheat and defraud the said Mary Wilhite, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid do say, that the said Samuel Boon, in manner and form aforesaid, was guilty of fraud and deceit, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendant was convicted, and moved in arrest of judgment for defects in the bill of indictment, which motion,

was overruled by his Honor, and judgment pronounced, from which the defendant appealed. The points discussed in this Court, are stated in the opinion of the Court.

Attorney General, for the State.
Edney, and *Avery*, for the defendant.

Pearson, J. The verbiage, useless averment, and vain repetitions used in many of the forms of indictments, have become the subject of just remark, as tending to produce prolixity and confusion, instead of certainty, These excrescenses have creeped in, because most draftsmen, under cover of the maxim, *utile per inutile non vitiatur*, out of abundant caution, will use a word, make an averment, or a repetition, without stopping to decide upon its materiality, under the idea that, if it does no good, it will do no harm.

The solicitor, who drew the indictment, in *State* v. *Fish*, 4 Ire. Rep. 219, from which the present indictment was taken, seems to have made an experiment, to see how many of the averments, in the usual form of an indictment for "cheating by false tokens" could be dispensed with. The question is, whether he has left enough, or has trimmed too close.

Fish's case went off upon another point, and it did not become necessary to pass upon the sufficiency of the indictment; consequently it has no bearing, as an authority, on the present question, except to the extent of showing that the departure from the usual form, was not so clearly liable to objection as to induce the Court to remark upon it, to prevent its being followed as a precedent.

Several objections are now made to it:

1st. There is no averment as to the sort of a quarter of a dollar that the false token was made to counterfeit—whether metal or paper—Spanish milled, or Mexican—or a twenty-five cent piece of United States coin.

The averment is unnecessary. It was not material to ascertain the sort of money which the false token was made to counterfeit—the defendant's guilt in nowise depending on it,

and the general averment, that it was a counterfeit quarter of a dollar, made the charge with sufficient certainty, to apprise the defendant of the specific act, for which he was then indicted, and to enable him, should he be so unfortunate as to fail in his defense, to plead his conviction in bar of a second prosecution. In 3 Bos. and Pul. 145, a case is cited by one of the Judges, in which a man was indicted for stealing *a 5l. note*, without adding any further description, and the indictment was considered sufficient, notwithstanding the generality of the description. In *State* v. *Rout*, 3 Hawks' Rep. 618, an indictment for stealing *one twenty dollar bank note on the State bank of North Carolina*, was held sufficient, notwithstanding the description was general, and was erroneous in one particular, i. e., the name of the bank. The Court say, "A note on the State bank is as intelligible, as a note issued by the bank, and would be understood, in common acceptation, in the same sense; for it is a familiar mode of speech to say *a note on a man*, and is understood as a note drawn by a man." So, a quarter of a dollar is a familiar mode of speech, and is understood, in common acceptation, to mean a coin of a certain value; whether it be a quarter of a Spanish mill, or of a Mexican dollar, or a twenty-five cent piece of United States' coin, we have seen, is not material.

2nd. There is no averment that the false token was made like a quarter of a dollar, or had so much the appearance of one, as was calculated to deceive an ordinary person.

It is averred to be a *counterfeit* quarter of a dollar. The word "counterfeit" *ex vi termini*, means a thing made to have the resemblance of some other thing. Whether the resemblance be close or not, depends upon the skill of the maker; but it cannot, with propriety, be called a counterfeit, unless it have so much likeness of the originial as is calculated to deceive. All the verbiage used to express the many shades of the same idea, cannot, on paper, make it clearer than the averment that it was a *counterfeit*. If, upon the trial, the false token produced in evidence, did not look like a quarter of a dollar, or was not so much like it, as to show that it was made with

an intent that it should be like it, or if the attempt to make a counterfeit, had been so unsucessful, that the thing "was not calculated to impose upon the credulity of ordinary men," (*State* v. *Simpson*, 3 Hawks' 620; *State* v. *Patillo*, 4 Hawks' 348,) for instance, if it was a brass, or pewter button, or round piece of metal, without any of the devices impressed on coin, it was the duty of the Judge to instruct the jury, that the variance between the allegation and the proof was fatal, and that the thing produced did not support the averment that it was a counterfeit quarter of a dollar.

3rd. There is no averment that the counterfeit quarter of a dollar was passed, or delivered by the defendant, to Mary Wilhite, so as to show *how* he obtained the gingerbread by means thereof.

The averment, that he obtained the gingerbread by means of this false token, necessarily imports that he passed, or delivered it to her, because, that is the only mode in which he could have obtained it by means of the counterfeit quarter of a dollar, and such is the ordinary acceptation in which the words are understood. It is trifling to say that, he might have obtained the gingerbread by telling her he had so valuable an article, or by showing it to her, or by jingling it, so as to let her hear the sound thereof. This objection, besides, is fully met by the fact, that the averment is in the precise words of the statute.

4th. There is no averment of the value of this particular piece of gingerbread, or that it was of any value.

In an indictment for larceny, it is necessary to aver the value of the article stolen, in order to distinguish between grand, and petit larceny; so the value of the instrument, by which a homicide is committed, is averred, because it is forfeited as a deodand; but no reason can be suggested why the value of this piece of gingerbread should be averred. It makes no more difference whether it was worth five cents, or five dollars, than it does whether it was a large, or a small piece; nor was it necessary to aver that it was of any value, for it was an article of property, and every thing which the law recognizes as property,

is presumed to be of some value. *Dodson* v. *March*, 4 Dev. and Bat. Rep. 146. This is assumed in the statute, under which the indictment is drawn: "any money, property, or *other* thing, of value."

5th. There is no averment, that the gingerbread was the property of Mary Wilhite.

The indictment avers that the defendant obtained the gingerbread from her, with an intent to cheat and defraud her. She could not be defrauded, nor could this averment be proven, unless the gingerbread was her property. For this reason, we consider the objection met by the averment. In an indictment for larceny, it is necessary to aver the ownership of the article stolen, for if the charge was "a piece of gingerbread, then and there being found, feloniously did steal, &c., without averring to whom it belonged, the party might be again indicted for stealing a piece of gingerbread, and there would be no means of deciding whether it was the same piece of gingerbread or not, because there is nothing to identify it. But in an indictment for obtaining, by a false token, the averment of an intent to cheat, and defraud, a particular individual out of the piece of gingerbread, does identify it, and secures the same certainty as the averment in an indictment for larceny that the article is the property of a particular individual, and affords an equal protection against another indictment.

The counsel, for the defendant, relies upon *Norton's* case in in 8th Carrington and Payne, 196. The case was upon 7 and 8, Geo. 4 ch. 29, and is referred to in Roscoe's Crim. Ev. 428. The reports of Carrington and Payne, are not within our reach, except so much as is contained in the Eng. Com. L. Rep. Unfortunately, Norton's case is not reported at large; only the head note is given, 34 E. C. L. R. 350. "An indictment, under 7 and 8 Geo. 4, ch. 8, for obtaining money under false pretences, is not good, unless, in addition to the false pretence, *it contain* the *requisites* of *a count for larceny*, and if it do not allege the money obtained to be the property of any person, it will not be sufficient, inasmuch as it could not in that state be pleaded as *a bar to a subsequent indictment for larceny*,

which it is made by the proviso in the 53 section." The statute, besides the proviso, that if, upon the trial, it shall be proved, that the defendant obtained the property, in such a manner as to amount in law to a larceny, he shall not, by reason thereof, be entitled to an acquittal of such misdemeanor, contains a further proviso, that "no person, tried for such misdemeanor, shall be liable to be afterwards prosecuted for larceny, upon the same facts." The decision in Norton's case, it seems, was put upon this latter proviso, which is not contained in our statute, although the first is. Consequently, that case is not in point. But we regret it is not in our power to examine it. For the proposition in the head note, that inasmuch as the proviso makes the proceeding for a misdemeanor, a bar to a subsequent indictment for larceny, *therefore*, the indictment for the misdemeanor, must contain all the requisites of a count for larceny, is clearly a *non sequitur*.

After a full consideration of the question, we have, for the reasons above stated, arrived at the conclusion that the averment of an intent to cheat, and defraud a particular individual, supersedes the necessity of a direct averment, that the article is the property of that individual, and that an indictment, under our statute, is distinguishable in this respect, very clearly, from an indictment for larceny.

At all events, we are satisfied that this defect, if it be one, comes within the provision of the statute, ch. 35, sec. 14, Rev. Code, "No indictment shall be quashed, or the judgment, thereon stayed, by reason of any informality or refinement, if in the bill, sufficient matter appears to enable the Court to proceed to judgment."

There is no error in overruling the motion to arrest.

Per Curiam. Judgment affirmed.

HARRISON M. WAUGH *v.* JOSEPH BRITTAIN.

"Due return" of process, means a proper return, made in proper time. What is a proper return, in form and substance, is a question of law, to be decided by the Court; but whether it was made in proper time, is a question of fact, to be decided by a jury.

This was a SCIRE FACIAS, to make absolute a judgment *nisi;* heard before his Honor, Judge DICK, at the Fall Term, 1856, of Surry Superior Court.

The defendant, as sheriff of Burke County, was amersed at Spring Term, 1856, of Surry Superior Court, in the sum of one hundred dollars, *nisi*, for failing to make due return of an execution, which had issued from that Court, in favor of the plaintiff, against one Gaither. The execution was produced, and on it was endorsed, "Came to hand 25th Oct., 1855." "No goods, nor chattels, lands, nor tenements, found in Burke County, to satisfy this fi. fa." Signed by the defendant as sheriff. The clerk of Surry Superior Court was examined, and swore that the execution, above mentioned, was not returned during the week of the Court, to which it was returnable, but on a day thereafter, to wit, on the 7th of March, 1856. The defendant's counsel contended that there being a proper and sufficient return on the writ, as the allegation in the sci. fa. was the failure to make a due return, the defendant was entitled to the judgment of the Court. But his Honor being of opinion with the plaintiff upon the law and facts of the case, gave judgment according to the sci. fa., from which the defendant appealed.

Mitchell, for the plaintiff.
Boyden, for the defendant.

BATTLE, J. We concur with his Honor in the opinion, "due return" of process, means a proper return, made in proper time; and such, we believe, has always been the construction put upon those words, as used in the act of 1777, (see Rev.

Code, ch. 105, sec. 17.) Whether, in any particular case, a due return has been made, may involve questions, both of law and fact. Whether the return is a proper one in form and substance, is a question of law, to be decided by the Court, but whether it was made in proper time, is a question of fact, to be decided by the jury. It is true, that in the case of *Kea* v. *Melvin*, 3 Jones' Rep. 243, it was held, that the Supreme Court, from which a *scire facias* had issued against a defaulting sheriff, and to which the return ought to have been made, must, itself, decide the facts involved in the issue made by the defendant's plea; but the decision was put expressly upon the ground of necessity, because the Court had no power conferred upon it, to have a jury summoned and impanneled. The jury is, by the principles of the common law, which we have adopted, the appropriate tribunal for the trial of disputed facts, and the Court ought never to assume that jurisdiction, unless it is expressly, or by a necessary implication conferred upon it by the Legislature.

Our opinion, then, is that his Honor erred in undertaking to decide a question of fact, whether the process was returned in proper time. Upon that fact, the jury will decide according to the evidence submitted to them. In it may be involved the consideration of the question, not only whether the process was actually returned to the clerk's office within the time prescribed by law, but whether the sheriff had used all due diligence in carrying it, or sending it by mail, or otherwise, and was prevented from filing it, or having it filed in the office, by such an accident, or necessity, as would excuse him.

The judgment must be reversed, and this opinion will be certified to the Court below, in order that that the cause may be there disposed of according to law.

Per Curiam. Judgment reversed.

MIRANDA STEPHENSON *v.* JAMES F. STEPHENSON.

In the appointment of an administrator, a person who cannot write, nor read writing, and has no experience in keeping accounts, or in settling estates, is *incompetent*, within the meaning of the statute. (Rev. Code, ch. 46, sec. 3.)

Where a Judge is vested with a discretionary power in making an appointment, but refuses to exercise such discretion, and appoints one whom he erroneously supposes he is bound, in law, to appoint, *Held* that an appeal would lie to this Court and the decision should be reversed, and the cause remanded, that he might proceed to exercise a sound discretion in making the appointment.

Appeal from an order, made by his Honor, Judge Dick, directing the appointment of an administrator. From Alexander county.

The plaintiff was the widow of the intestate, William Stephenson, and as such, made an application to the County Court of Alexander, at the first term after her husband's death, for administration upon his estate. Her appointment was opposed, upon the ground of incompetency, and the defendant, who was the appointee of the next of kin, (though not himself related to the intestate) was appointed.

The plaintiff appealed to the Superior Court, and it was made to appear to his Honor, that the plaintiff could not write, nor read writing, and had no experience in this kind of business, but that she was a woman of ordinary capacity, and a hale and hearty person.

The Court being of opinion that the word incompetent, mentioned in the statute, (Rev. Code, ch. 46, sec. 3.) "applied to the mind, and had regard to mental incompetency, and as the widow was a woman of ordinary capacity, and a hale and hearty woman, but had no experience in this business," he reversed the judgment of the County Court appointing the defendant, and directed a procedendo to issue to the said court, commanding them to give the appointment to the plaintiff, upon her entering into bond, with the sureties required by law. From which judgment the defendant appealed to this Court.

Mitchell and *Boyden*, for plaintiff.
W. P. Caldwell and *Neal*, for defendant.

Pearson, J. We do not concur with his Honor as to the meaning of the word, incompetent, as used in the statute. When two persons, who claim a right to administer, are in equal degree, the court may, in its discretion, grant the administration to one or both, "or if the person, applying, shall be deemed *incompetent*, then the court may grant administration to some discreet person." His Honor was of opinion that the word, incompetent, applied to the *mind*, and had regard to *mental incapacity*, and as the widow was a woman of ordinary capacity, and a *hale and hearty woman*, but had no experience in this business, he directed her to be appointed. One object of the statute was to provide that the management of estates should be entrusted to none but *fit* and *discreet* persons, and the word "incompetent" is obviously used in the sense of "unfit." This may be on account of mental incapacity, or bodily infirmity, or ignorance and inexperience in matters of business, such as keeping accounts, deciding upon the justness of claims, and many things of the kind, which require a considerable degree of experience, and capacity for the transaction of business. In this sense of the word, a woman who can neither write, nor read writing, and has no experience in business, is incompetent and unfit to be entrusted with the administration of an estate, although she may be ever so *hale and hearty*, and capable of much bodily endurance. The latter qualities would make her fit for an appointment where hard work was the object, but not for one where accounts are to be kept, and settlements to be made and returned to court. Indeed, such a woman, acting as administratrix, would be forced to trust to agents, and be at the mercy of designing persons, thereby exposing the interest of the other persons, who are interested in the estate, as well as her own, to the danger of much loss from mismanagement, if not from corruption; against which, it was the purpose of the statute to provide a safeguard.

But it is objected, this is a matter confided to the *discretion* of the court below, and consequently, this Court cannot interfere.

That would be true, provided his Honor had exercised his discretion; but the error into which he has fallen, cramped his action, and did not leave him free to make the appointment according to his sound discretion. So, this construction of the statute presents a question of law, and makes it our duty to correct the effect of his Honor's erroneous opinion in regard to it. In *Freeman* v. *Morris*, Busb. Rep. 287, his Honor refused to entertain a motion to amend, on the ground, that he had no power to allow the amendment. The judgment was reversed, because by reason of his erroneous opinion in respect to his want of power, he had not exercised his discretion. Our judgment is the same in this case, for the same reason. "The judgment must be reversed, and this opinion certified with directions to the Judge of the Superior Court, to proceed to make the appointment according to his sound discretion."

PER CURIAM. Judgment reversed.

LARKIN ESTES *v.* ISAAC OXFORD.

Under the act of 1844, chapter 36, regulating the common schools, a scholar regularly attending a common school, was not bound to work on a public road during a holiday occuring within the period of the session, that is, during the time for which the teacher was employed under the 13th section of the same act.

THIS was an action for a PENALTY, brought to the Superior Court of Caldwell, by appeal from the judgment of a justice of the peace, tried before ELLIS, J., at the Fall Term, 1856.

The action was brought against the defendant for the fail-

ure of his son, Sion, to work on a public road, and the following

CASE AGREED,

was submitted for the judgment of his Honor.

Sion was over eighteen years of age, but under twenty-one, living with the defendant, his father, within the bounds of the plaintiff, who was the overseer on the road.

The plaintiff notified the defendant to send his son, the said Sion, in due time, but did not notify the son.

At the time of the service of the notice, Sion Oxford was attending a common school as a scholar, and had been so attending from the commencement of the session. The days appointed for working the road (in Oct., 1855,) were in the week of a recess of the said school, though it was not known, when the notice was served, that there would be a recess at that time.

On the expiration of that week, the school was resumed, and the youth, Sion, again attended as a scholar, and did so, regularly, till the close of the session.

Upon the state of facts submitted, his Honor being of opinion with the plaintiff, gave judgment accordingly, from which the defendant appealed to the Supreme Court.

Lenoir, and *Avery*, for the plaintiff.
T. R. Caldwell, for the defendant.

Battle, J. It is unnecessary for us to decide whether the notice served upon the defendant, as a warning for his son to work on the road, was sufficient or not, as we are satisfied that the son was not liable to work on the road at all at the time when the notice was given.

The transaction occurred in October, 1855, before the Rev. Code went into operation, and must, therefore, be governed by the act of 1844, ch. 36, entitled "An act to consolidate and amend the acts heretofore passed on the subject of common schools." By the 31 section of that act, it is declared "that the teachers and pupils of any common school, shall be exempt from performing military duty, working on the road, or serv-

ing as jurors, whether engaged in teaching in said schools, or attending them as scholars."—By the terms, "attending them," (the common schools,) "as scholars," we clearly understand the Legislature to mean, whilst attending during the time for which the teacher shall be employed, as provided in the 13th section, without any regard to a recess, during the term, of a day, or even a week. The exemption, made in favor of teachers and scholars, from the performance of such necessary and important public duties, as military duty, working on the roads, and serving on juries, was manifestly intended to encourage the keeping and attending the common schools. It could hardly be deemed to be within the spirit of such encouragement, to force the teacher off to a militia muster, or one of the scholars to work on the road, during a holiday given perhaps for rest, or necessary recreation. In the present case, the defendant might, perhaps, put his defense upon another, but narrower ground, to wit, that at the time when he received the notice, his son was, in the strictest sense, attending the school, so that the notice then was of no effect; but we prefer to place it upon the broad ground, that the exemption extends through the whole session of the school, without regard to a holiday, or temporary recess.

The judgment given for the plaintiff on the case agreed, must be reversed, and a judgment of nonsuit must be entered.

PER CURIAM. Judgment reversed.

J. F. E. HARDY *v.* HEZEKIAH ANDREWS.

The entry of the usual formula of an assignment of a bail-bond, with the sheriff's name in the body of it, and the usual form of a seal attached, without the sheriff's name being set down to the same, is not a good assignment, under the act of Assembly.

THIS was a SCIRE FACIAS to subject the defendant as special

bail, tried before CALDWELL, J., at the Spring Term, 1857, of Buncombe Superior Court.

The scire facias recited that a writ in behalf of the plaintiff, against one P. Hawkins, came to the hands of the defendant as sheriff of Randolph County, which he executed on the said Hawkins, and took a bail-bond for his appearance at the term to which the said writ was returnable, but that he failed to assign the same to the plaintiff, according to the provisions of the act of Assembly, and summoned the defendant to show cause why he should not be made liable as special bail.

The defendant pleaded that he assigned the bail-bond taken by him, to the plaintiff by an assignment in the following words, to wit: "I, Hezekiah Andrews, sheriff of Randolph County, do hereby assign over the above obligation and condition to J. F. E. Hardy, the plaintiff therein named, his executors, and administrators, according to the statute in such cases made and provided. In witness whereof, I have hereunto, set my hand and seal, 29th day of March, 1849.

* * * * * (SEAL,)"

which he alleged and insisted was, in law, a good and sufficient assignment of the bond and conditions therein contained.

The plaintiff demurred to the said plea on the ground, that it was not sufficient in law to bar the plaintiff's right to recover.

The question raised by these pleadings was, whether the name of the defendant, as sheriff, being in the body of the assignment, and a scrawl appended in the usual form of a seal without any name affixed, was a good and proper execution of the assignment.

His Honor being of opinion that it was not, sustained the demurrer, and gave judgment for the plaintiff, from which the defendant appealed.

Avery, for the plaintiff.
Baxter, for the defendant.

NASH, C. J. This is a sci. fa. to subject the defendant as

special bail. The defendant is the sheriff of Randolph County, and as such a writ was placed in his hands by the plaintiff to be executed on the persons therein named. The defendants in the writ were duly arrested, and the bail-bond, set out in the case, was executed by them. At the return term of the sci. fa., a special plea was filed by the defendant, setting forth an alleged assignment of the bond to the plaintiff, made by him. To this plea there is a demurrer.

The only question before us is as to the sufficiency of the assignment.

The original process, upon which these proceedings are had, issued in 1853, and the bail-bond and the alleged assignment were executed in March, 1849. So, that the question before us is not affected by the act of 1856. The provision of the act of 1836, Rev. stat., ch. 10, sec. 2, under which the proceedings are had, directs that "all bail-bonds, to any of the courts, &c., shall be assigned by the sheriff, &c., returning the same, by an endorsement thereon, in the following form, &c.," which has been pursued by the defendant in this case, but the form concludes as follows: "In witness, whereof, I have hereto set my hand and seal, this the —— day of ———, ——;" "and every sheriff, &c., failing to make *such* assignment, shall be deemed, held, and taken as special bail in the same manner as if no bail-bond had been returned. To the return of the bail-bond, there is what is insisted by the counsel, a sufficient assignment. The form begins, "I, Hezekiah Andrews, sheriff, &c.," and to it, there is a printed seal, the whole form being printed, but there is no name preceding the seal. That is in blank. This presents the only question in the case. Is the appearance of the name in the body of the form a compliance with the requirement of the act? We think not. The conclusion of the form, set out in the act, is a sufficient answer. Seals were adopted to written instruments long before the art of writing was in general use. Each individual adopted some device in his seal, showing, thereby, its appropriation by him. When, however, in process of time, writing became more diffused among the community, this appropria-

tion of the device of the seal passed out of use, and the appropriation of the particular seal, to the use of him who claimed it, was evidenced by the person affixing his name to the seal.

This is peculiarly necessary in this State, where it has been judicially decided, that any scrawl affixed to a man's name purporting to be a seal, is a seal. It is the mode of identification and appropriation. If the scrawl is not preceded by the name of any one, it is not the seal of any one, and the instrument is not a deed. This is the first attempt we have known, to apply to deeds the construction given to wills under the statute of wills as to signing the script by the testator.

The assignment of the bail-bond, attempted by the defendant, is incomplete, and therefore of no effect, or force, in consequence of the omission of the name preceding the scrawl. This omission is not supplied by the sheriff's name appearing in the body of the instrument. See *Mann* v. *Hunter*, 2 Jones' Rep. 11.

PER CURIAM. There is no error. Judgment affirmed.

Den on the dem. of JOHN H. JOHNSON *v.* JOHN F. PENDERGRASS.

The certificate of a clerk, endorsed upon a deed, or attached to it, showing that it was proven before him, in his county, followed by an order for registration, is sufficient, without showing that it was taken in his office and a record made of such probate.

ACTION of EJECTMENT, tried before ELLIS, Judge, at the Fall Term, 1856, of Cherokee Superior Court.

A deed to the lessor of the plaintiff, for the land in controversy, was offered in evidence, and objected to by the defendant's counsel, upon the ground, that it had not been duly proved and registered. The certificate of probate, entered on the deed, is as follows:

"State of North Carolina, Cherokee county, September 9th,

1854. The execution of the within deed was, this day, duly proven before me, by the oath of W. C. Walker, the subscribing witness thereto, for the purposes therein contained. Therefore ,let it be registered. Certified by me.

Signed, Drury Weeks, Clk."

The certificate of the register, in proper form, was entered below the above, and was objected to, only upon the ground, that the clerk's certificate was not sufficient to authorise it.

His Honor held that the certificate was sufficient, and admitted the deed to be read; whereupon, the defendant excepted.

Verdict for the plaintiff. Judgment; and appeal by the defendant.

J. W. Woodfin, for plaintiff.
W. L. Tate, and *Baxter*, for defendant.

Battle, J. The only question made on the trial was, whether the deed, under which the lessor of the plaintiff claimed, had been duly proved and registered. The act of 1852, ch. 133, (Rev. Code, ch. 37, sec. 2,) authorises the clerks of the county courts to take and certify the probate of deeds, &c., in their respective counties, and the objection to the certificate of probate in the present case is, that it does not state that the probate was taken by the clerk in his office, and that a record thereof was made by him. There is certainly nothing of the kind expressly required of him by the act, and we cannot discover any thing in its policy which would justify us in making such a requisition by construction. The terms of the law seem to be fully complied with, when the certificate of the clerk, followed by an order of registration, is endorsed upon, or annexed to the deed, and shows that the probate was duly made before him, in his proper county. That is a sufficient authority for the registration of the instrument by the register, and is all that has ever been deemed necessary in the certificate and fiat of a Judge. In the Revised Code, the authority to take the probate of deeds and

other instruments, is conferred upon both officers in the same terms, and we cannot perceive any good reason why more should appear in the certificate of the one, than in that of the other, except in the particular, that the clerk's certificate must show that he is acting within his own county. The certificate and order, in the present case, were amply sufficient to authorise the registration, which the certificate of the register shows, was duly made, and the deed was, therefore, properly admitted in evidence. There is no error.

PER CURIAM. Judgment affirmed.

A. R. HOMESLEY *v.* STEPHEN HOGUE.

Only such estate as a debtor has, passes by virtue of an execution sale.

The owner of an ultimate estate in chattels, cannot maintain an action against a sheriff, who has an execution against the owner of a particular interest, for selling it, although he professes to sell the entire property in such chattels.

This was an action of TROVER, with a count in CASE, tried before ELLIS, Judge, at the Fall Term, 1856, of Cleaveland Superior Court.

The action was brought to recover the value of several slaves, which it was alleged he had an estate in, and which had been sold and converted by the defendant. The plaintiff bought the slaves, in question, from one Joseph Hardin, and took from him a bill of sale, as follows:

"Received of A. R. Homesley twenty-three hundred dollars in full payment for six negroes, viz: one old man named Harny, &c., (describing them,) which negroes I warrant to be sound in body and mind; also, I warrant the title good. July 12th, 1853. J. HARDIN, [*seal.*]"

At the same time the plaintiff executed and delivered to Hardin the following instrument, viz:

"I have this day bought six negroes of Joseph Hardin, and have paid him twenty-three hundred dollars for the same. He is to have the use or hire of the negroes until the 15th of October, for boarding them till that time. I also give him liberty to sell the said negroes to any other person, provided he does so in one month from this date, by refunding me my money. The negroes, Sol, Harny, &c., (describing the same as are contained in the foregoing bill of sale). Signed, A. R. Homesley."

It was proved that the defendant had the slaves sold entire, and not the particular interest of Hardin only, in order to satisfy an execution in his favor against Hardin, and the said property was bought by the latter.

Upon these facts, it was intimated by his Honor, as his opinion, that the plaintiff could not recover; for the reason that Hardin, the debtor, had an interest in the slaves, which could be sold under the execution.

In submission to which opinion, the plaintiff took a nonsuit, and appealed to this court.

Guion and *Lander*, for plaintiff.
Baxter, *Cabaniss*, and *Hoke*, for defendant.

Pearson, J. A sale, under execution, passes only such interest or estate as the debtor may rightfully pass, because it operates by act of law. If, therefore, a debtor has a particular estate, and the property is sold under execution, the party entitled to the ultimate estate, or remainder, (as it is usually termed,) has no ground of complaint; for his estate is in nowise interfered with, notwithstanding the officer may profess to sell the "entire estate, and not a particular interest only."

In our case, the debtor was entitled to the slaves from the 12th of July, 1853, until the 15th of October, and we assume from the statement, that the sale was made during that time. The defendant did not interfere with them afterwards. It is clear that the count in trover cannot be maintained, for the

plaintiff was not entitled to the possession at the time of the supposed conversion. It is equally clear, that the count in case, could not be sustained, for, as we have seen, the sale which was made, at the instance of the defendant, in nowise interfered with his estate. It is only in cases where the property is destroyed, or removed to parts unknown, (which is considered as amounting to a destruction,) that a remainderman can maintain "case" for the injury to his estate; upon the same principle that a tenant in common is allowed, under such circumstances, to maintain an action.

There is an additional fact set out in the statement: *The debtor bought the property;* so that to all intents and purposes, the plaintiff, after the sale, stood *in statu quo*, and his having a cause of action, either in *trover* or *case*, is out of the question. There is no error.

PER CURIAM. Judgment affirmed.

Den on demise of JACKSON STEWART *v.* JOHN RUTHERFORD.

A sheriff cannot, by an agent, purchase property at his own sale.

THIS was an action of EJECTMENT, tried before CALDWELL, J. at the Spring Term, 1857, of Yancy Superior Court.

The plaintiff, as sheriff of Yancy County, had in his hands a *venditioni exponas*, founded upon the levy of a justice's execution, in favor of Isaac A. Pearson, against one Keller, under which the land in dispute, was sold to one Brayles at the sum of $3,50. A deed was made to the said Brayles by the plaintiff, as sheriff, dated 17th of May, 1854, and on the same day Brayles conveyed the land back to the plaintiff at $12.

The declaration, in this case, was served on Keller, and the defendant, Rutherford, was allowed to come in and defend in his stead, by entering into the common rule. The defendant, after producing a deed from Keller to him, reciting a consid-

eration of $200, showed the following facts: The principal of Pearson's debt, against Keller, was about $29, and the cost $5,43. In March, Keller paid the plaintiff on the execution $29, and took his receipt for the same. At April Term, of the court of Yancy, Pearson and Keller met, and early in the week they came to an understanding that the land was not to be sold, which was communicated to the plaintiff, who assented to the arrangement. Both Pearson and Keller left the court-house on Thursday or Friday of the court week under the impression that the land was not to be sold. Without any further notice to the parties interested in the debt, the land was, next day, exposed to sale by plaintiff under this execution, and bid off by Brayles, as heretofore stated—few persons being present.

The Court, in his charge to the jury, told them that there was evidence to leave to them, tending to show that Brayles had purchased the land for Stewart, the plaintiff; that if such was the fact, the sale was void, and the plaintiff could not recover. Plaintiff excepted to this charge.

Verdict for the defendant. The Court rendered a judgment for the defendant, and the plaintiff appealed.

Edney, for the plaintiff.
Gaither, and *Avery*, for the defendant.

Nash, C. J. There is no error. The plaintiff, as sheriff of Yancy County, had in his hands an execution against one Keller, which was levied on the land in dispute, and at the sale, one Brayles was the highest bidder at the price of three dollars and fifty cents. The land was worth three hundred, or three hundred and fifty dollars. About a month after, the sale to Brayles, the plaintiff executed a conveyance to him of the land, and on the same day, Brayles executed a conveyance to him of the same land. His Honor instructed the jury in substance, that if Brayles purchased the land for the plaintiff, the sale was void, and the plaintiff could not recover. There can be no question of the correctness of the charge. There is no

principle in our law better settled, than that a sheriff cannot purchase at his own sale, and it would be a miserable evasion of the law if he could rightfully do that by an agent which he is forbidden to do himself. If, by so shallow a contrivance as this case presents, the law can be eluded, the principle, forbidding a sheriff to prostitute his office to his own iniquitous gain, would not be worth a straw. The importance of the prohibition imposed upon the sheriff could not be better exemplified than by the facts set forth in this case. The plaintiff and the defendant in the execution, settled their business to their mutual satisfaction, and the plaintiff was informed of it, and told that the land was not to be sold. The parties left the ground, and on the following day, in the absence of the defendant in the execution, when but a few persons were present, the land, worth $300, was sold, and Brayles proclaimed the purchaser at the sum of $3,50, and when the conveyance was made by the plaintiff to Brayles, he immediately reconveyed it to the sheriff at the nominal price of $12.

The weight and effect of the testimony was left to the jury, and they, by returning a verdict for the defendant, found that the plaintiff was himself the purchaser through his agent, Brayles. See *Foard* v. *Blount*, 3 Ire. Rep. 517; *McLeod* v. *McCall*, 3 Jones' Rep. 87.

PER CURIAM. Judgment affirmed.

CORNELIUS VANOVER *v.* JAMES THOMPSON.

A bond, conditioned that the obligee shall not appear as a prosecutor, or as a witness, against the defendant in a criminal proceeding, whether it be a case of felony or a misdemeanor, is null and void.

THIS was an action of DEBT, brought originally before a single magistrate, and by successive appeals, taken to the

Superior Court of Ashe, where it was tried before Ellis, J., at the Special Term, June, 1857.

The plaintiff declared on the following bond: "On, or before, the 25th day of December next, I promise to pay Cornelius Vanover, twenty-five dollars in money, and fifteen dollars in cattle, to be delivered where John Thompson now lives, as witness my hand and seal: now this note to be good and legal, provided the said Vanover shall not appear as a prosecutor, or witness, against James Thompson, with whom the said Vanover has a controversy. Now if the said Vanover shall thus appear, this note to be null and void."

The plea was, that the bond was given to compound a prosecution, and against the policy of the law.

The justice of the peace, before whom the State's warrant, against the defendant, was returned, testified, that on being informed by the parties, that the matter in controversy was compromised, as set forth in the bond, (being the same day the bond was given,) he dismissed the warrant.

A verdict was taken for the plaintiff, with an understanding that the Court might set it aside, and enter a nonsuit, if upon consideration, he thought the action could not be sustained.

Afterwards, on consideration of the case, the Court ordered a nonsuit; and plaintiff appealed.

Neal, and *Boyden*, for the plaintiff.
Mitchell, for the defendant.

Nash, C. J. There is no error. Three cases, decided at the December Term, 1856, of this court, have settled the principle in contest here. *Thompson* v. *Whitman*, 4 Jones' Rep. 48; *Ingram* v. *Ingram*, Ibid 188; *Garner* v. *Qualls*, Ibid 223.

In the first of these cases, it is decided that the concealment of a felony is an indictable offense, and that the offense is greatly aggravated by compounding the felony, that is, "by an agreement not to prosecute, or make known what has come to the knowledge of the party." In offenses less than felony,

this compounding or concealment is not indictable, but it is, nevertheless, against the policy of the law and the due course of justice, and a court of law will not lend its aid to enforce any such contract or agreement.

In *Garner* v. *Qualls*, the same doctrine is held—the court declaring that no executory contract, the consideration of which is *contra bonos mores*, or against the public policy, or the laws of the State, can be enforced in a court of justice. The consideration there, was the compounding, or suppressing, a prosecution for an alleged forgery. The bond is declared void, although the act may never have been, in the view of the law, a forgery.

In *Ingram's* case, the court declare that an agreement among persons interested in an estate, not to bid against each other at the administrator's sale, is void, as being against the public policy.

It may be now, therefore, pronounced a settled principle, "that all contracts founded upon agreements to compound felonies, or to stifle prosecutions of any kind," are void, and cannot be enforced.

The note upon which the action is brought, has this condition, to wit: "Now, this note to be good and legal, provided the said Vanover shall not appear as a prosecutor, or witness, against James Thompson, with whom the said Vanover has a controversy; now, if the said Vanover shall thus appear, this note to be null and void."

A State's warrant had been issued by a justice of the peace against the present defendant, Thompson, at the instance of the plaintiff. On its return before the magistrate, Vanover did not appear as a prosecutor, or witness, and the proceedings were dismissed. What was the charge against Thompson, we are not informed, nor is it material in this investigation; the note, upon which the suit is brought, was given for the compounding of a prosecution—the suppression of testimony in the case—an iniquitous obstruction of the course of justice, which in one class of cases is indictable, and in all, is contrary to the law, and justice.

In the defense, it was insisted, that parties are frequently permitted, in the courts in England, to compromise, or come to an understanding on an indictment for a misdemeanor. That is true, but it is always done under the sanction of the court, and after a conviction, to enable the court to properly graduate the punishment of the defendant; and it is frequently done in this State by our Judges. But in nowise can such a case amount to an improper interference with the course of justice.

The bond or note, upon which the action is brought, is void on account of the corrupt and illegal consideration upon which it is founded.

PER CURIAM. Judgment affirmed.

WILLIE GAITHER *v.* J. R. BALLEW.

Money in the hands of a clerk and master in Equity, arising from the sale of land for partition, may after an order for distribution, be attached, and the clerk and master may be garnisheed in respect thereto.

(*Peace* v. *Jones*, 3 Murph. Rep. 256; *Gibbs* v. *McKay*, 4 Dev. Rep. 172; *Elliott* v. *Newby*, 2 Hawks' Rep. 22; *Simpson* v. *Harry*, 1 Dev. and Bat. Rep. 206; *Orr* v. *McBride*, 2 Car. law Rep. 257; *McLeod* v. *Oates*, 8 Ire. Rep. 387; *Carrol* v. *Hussey*, 9 Ire. Rep. 89, cited and approved; *Alston* v *Clay*, 2 Hayw, Rep. 171; *Overton* v. *Hill*, 1 Murph. Rep. 47, overruled.)

THIS was an action by ATTACHMENT, tried before CALDWELL, J., at the Spring Term, 1857, of Caldwell Superior Court.

The heirs-at-law of Peter Ballew, sen., filed a petition in the Court of Equity of Caldwell County, describing certain lands descended to them, as tenants in common, from their ancestor, the said Peter Ballew, and praying that the same should be sold for partition. The prayer of the petition was granted, a decree of sale made, the land sold, and the money being collected, was ordered to be divided equally among the petitioners. Most of the heirs drew their shares from the

office, but before the shares of J. R. Ballew and Peter M. Ballew were taken out, this attachment for a claim of $152, against them as absconding debtors, was issued, and Mr. Puett, the clerk and master in Equity, summoned as garnishee. There were interpleaders as to the share of Peter M. Ballew, alleging assignments, and deeds of trusts of his part, but as from the answer of the garnishee, it appeared that the share of J. R. Ballew, which he held as aforesaid, was sufficient to discharge the plaintiff's claim, the questions as to the other share were passed over by the Court. The only question, therefore, which the case presents, is whether the money belonging to J. R. Ballew in the hands of the clerk and master, was liable to be attached, and the foregoing facts were agreed on, and submitted to his Honor. The Court decided against the plaintiff, who appealed to this Court.

Avery, for the plaintiff.
Gaither, for the defendant.

Pearson, J. It is not necessary to complicate the case by taking into consideration any other matter, save that in reference to J. R. Ballew, because the amount belonging to him in the hands of the garnishee, is more than enough to discharge the debt of the plaintiff.

Puett, the garnishee, states that he has in his hands $377,85 —money belonging to J. R. Ballew—that the money came into his hands as clerk and master of the Court of Equity, under a decree for the sale of the land of Peter Ballew, sen., on a bill, filed by the heirs-at-law for a sale for the purposes of partition; that J. R. Ballew was one of the heirs, and that his share, to wit, $377,85, still remains in his hands as clerk and master. The question is, can this money, belonging to an absconding debtor, be reached by a creditor under the provisions of the statute in reference to original attachments and garnishments?

The statute subjects to attachment, all the estate of an absconding debtor, and *all debts* due to him by any person,

and *all effects belonging to him in the hands of any person.* This money falls under the description of "effects belonging" to J. R. Ballew, (the absconding debtor), in the hands of Puett, (the garnishee.) So the case is within the words of the statute, and the question is, what is there to take it out of its operation?

If there be any thing, it must be the fact that the money was received, and still remains in the hands of Puett as clerk and master in Equity.

How it would have been before the money was collected, and an order of distribution, we are not now to inquire; but most of the other heirs having received their shares, this money has been ascertained and set apart as belonging to J. R. Ballew, being his share. The point is, does the fact that Puett, who has the money in his hands, is the clerk and master in Equity, take the case out of the operation of the statute?

If a case falls within the words of a statute, it must be within its operation, unless there be a sufficient reason for making it an exception.

By way of illustration:—If a debtor is entitled to an *equitable* chose in action, in a general sense, this is "a debt due to him," within the words of the statute, but as the proceeding is in a court of law, which from its mode of trial, &c., is not competent to deal with, and *ascertain* equities, the case, for that reason, is made an exception, and is held not to be within the operation of the statute. This is assumed in *Peace* v. *Jones*, 3 Murph. Rep. 256, and a distinction is taken: when the objects of a deed of trust are accomplished, so as to leave but one equity, which is *ascertained* and *fixed*, i. e., the excess of the proceeds of the sale of the property conveyed, after the debts secured by the trust, are all paid, whether such excess be in money or in notes, it may be reached by attachment and garnishment; "considering the general scope and spirit of the statute;" on the ground, that the reason for making an exception, in respect to equitable choses in action, no longer exists after the extent of the equity is *ascertained.*

So, in *Gibbs* v. *McKay*, 4 Dev. Rep. 172, is *held*, that where

the wife of a debtor is entitled to a share of certain slaves, conveyed by deed "to hold in trust, to be divided into three equal parts, &c.," the husband's interest is not subject to attachment, and in a very elaborate opinion, RUFFIN, C. J., expresses the opinion, that where slaves are held in trust for two, or more, the interest of one of the *cestuis qui trust*, is not subject to attachment, because it could not be sold under execution by force of the act of 1812, inasmuch as the purchaser would acquire a part of the legal estate, and hold as tenant in common with the trustee, which division of the legal estate would embarras the execution of the trust; for which reason, the case would be an exception, although the slaves would be "effects belonging to the debtor" in the hands of the trustee.

So, in *Elliott* v. *Newby*, 2 Hawks' Rep. 22, it is held that the interest of a debtor, who is entitled to a distributive share of an estate, is not, (*before the estate is settled, and the amount of the share ascertained*), subject to attachment; for the reason, that distributive shares and legacies are not recoverable in a court of law; but HENDERSON, J., expresses an inclination of opinion to the contrary; although, as he says, "the authorities are the other way."

The reason for which this class of cases is made an exception, is that the amount of a distributive share, or the right to a legacy, depends upon how far there is enough to pay debts, which involves the necessity of taking an account; and it is admitted that the mode of trial in a common law court, is not adapted to that purpose. But if we suppose the amount of the share to be ascertained, and the money itself set apart for the distributee, then the reason for making the case an exception, no longer exists. So, property held by, or debts due to an absconding debtor as a *trustee*, is an exception, for the reason, that he has nothing but the *naked* legal title, and a purchaser, or the person claiming under the proceeding, would be in Equity, bound by the original trust. *Simpson* v. *Harry*, 1 Dev. and Bat. Rep. 206.

So, money in the hands of a sheriff, collected under an execution in favor of an absconding debtor, forms an exception,

and is not subject to attachment; nor is the sheriff subject to garnishment in respect thereof. This exception is made, not for the reason that the *person* having in his hands the effects of an absconding debtor, is an *officer of the court*, but on the ground that *the writ commands* the sheriff to make the amount, and *have it at the next term of the court, and make due return thereof*, and that the performance of the duty imposed by this order of the court, would be made impossible, or at all events, that its discharge would be greatly embarrassed, if the fund was liable to be intercepted by an attachment, or garnishment. In *Orr* v. *McBride*, 2 Car. Law Rep. 257, this exception is admitted, but a distinction is taken in respect to the surplus in the hands of the sheriff after paying the amount of the execution, and it is decided that the surplus may be reached by a creditor of the debtor in the execution, and the court say, "It has been ruled that money in the hands of a sheriff, raised by him in obedience to a writ, is not attachable, because it would interfere with the rights of others—embarrass, and sometimes render ineffectual, the process of the Court, and produce endless litigation. But a surplus remaining in the sheriff's hands, is the property of the defendant in the suit, who may immediately demand and enforce the payment thereof, on which account it is considered that the sheriff holds it in his private character, and not in his official capacity, although it came to his hands, and he is accountable for it *in virtute officii*."

For similar reasons it is held that, when an execution issues against A, and is levied *bona fide* on property in possession of B, on the allegation that the property really belonged to A, the action of *replevin* will not lie against the sheriff, or other officer, making the levy, either at common law, or under our statute. *McLeod* v. *Oates*, 8 Ire. Rep. 387; *Carroll* v. *Hussey*, 9 Ire. Rep. 89. The decision is not put on the ground that the taking, or the detention, or the conversion, was by an officer of the Court, but on the ground that the execution of a command of the Court would be prevented or embarrassed, if the officer could be stopped by the writ of replevin, and it is

therefore held that, although the case is within the words of the statute, it is excepted out of its operation.

These are all of the cases, (with the exception of two, that will be referred to), which have been decided by our court, involving the construction of the statute, and they establish this position: to take a case out of the operation of the statute, the fund must be unascertained, and of such a nature that a court of law cannot deal with it, or it must be in the hands of an officer, the performance of whose duty in regard to it would be prevented or embarrassed, if it was subject to be intercepted by the claim of an attaching creditor.

Upon the authority of these decisions, and the reasons on which they are put, we should have arrived at the conclusion, without hesitation, that a fund which is *ascertained*, in regard to which the Court is expected to take no further action, and which is no longer subject to its control, but may be immediately demanded, and the payment thereof enforced by the debtor, was subject to attachment, although the person who had it in his hands, happened to be the clerk and master in Equity, but for the cases of *Alston* v. *Clay*, 2 Hayw. Rep. 171, (Battle's edition, 360), *Overton* v. *Hill*, 1 Murph. Rep. 47, the one decided in 1802, and the other in 1805, which were cited and relied on in the argument. Both of these cases were decided before the present organization of this Court. In *Overton* v. *Hill*, the opinion of the Court is given without any reason or reference to authority, and is a *mere echo* of Alston and Clay. In the report of that case, Haywood's argument for the plaintiff is set out, and without noticing the reasoning of the learned counsel, the Court announces the proposition, that it had been several times decided, that moneys in the hands of a *sheriff* cannot be attached—therefore, that moneys in the hands of a *clerk of the court* cannot be attached, which is a *non sequitur*. True, the clerk as well as the sheriff, is an officer of the Court, but the reason for making an exception in respect of money in the hands of the sheriff, is not because he is an officer of the Court, but because he could not obey the command of the writ, and the discharge of the duty

imposed upon him, would be embarrassed, if the money could be intercepted by an attachment; which reason does not apply to the case of money in the hands of a clerk. The conflict between these two cases, and the subsequent cases to which we have referred, is pointed at in a note by the editor of the last edition of Haywood's Reports. After full consideration, we are satisfied that the two cases cannot be supported; being opposed as well by the reason of the thing, as by all the cases on the subject.

The provision of the Revised Code, ch. 7, sec. 20, by which a creditor is enabled to reach, by a bill in Equity, a fund which cannot be attached at law, so far from being opposed to our conclusion, tends to support it; for it shows that the Legislature looked upon the remedy by attachment as a subject entitled to favor, and to a liberal construction, because it tended to secure the ends of justice; for which reason, they give a creditor an attachment in Equity, where the fund cannot be reached by an attachment at law.

The judgment in the Court below must be reversed, and a judgment entered for the plaintiff. There was no controversy as to the facts, and the case is presented as one agreed, the only purpose being to decide the question of law, although the statement is not drawn in a manner strictly formal.

PER CURIAM. Judgment reversed; and judgment for the plaintiff.

J. F. LITTLE, *propounder*, *v.* DAVID LOCKMAN *and others, caveators.*

Where a decedent had two drawers, in one of which he kept his notes, deeds, and other papers of value, carefully arranged, together with his money and other valuable effects, and in the other, he kept some papers of little value, carelessly deposited, with some effects of very small value, it was *Held*, that a holograph script, found in the latter place, could not be proved as a will, under the statute, 1 Rev. Stat. ch. 122, sec. 1; for that the articles

found with the script, could, in no just sense, be called "*the* valuable papers or effects" of the decedent.

(Mem. In the Revised Code, ch. 119, sec. 1, the phraseology is altered to read "valuable papers *and* effects.")

This was an issue *devisavit vel non*, tried before Bailey, J., at a Special Term, June 1857, of Lincoln Superior Court.

The script, in question, was propounded as the holograph will of William Little, and it was proved by three witnesses, to be in the hand-writing of the decedent.

It was proved that the paper-writing in question, was found, shortly after the death of Mr. Little, in the drawer of a bureau belonging to him, in which were also found several other paper-writings, all in the hand of the decedent, purporting to be testamentary dispositions of his property, some of which were finished, and others incomplete, all of different dates. There were found in the same drawer, a number of receipts against doctors' bills, and merchants' accounts, lying about promiscuously. There were also in the same drawer, an old copy-book and a pocket-book or purse, which had belonged to a deceased child of the decedent, in which was about eighty cents in silver change.

In the same bureau there was another drawer, in which were found the deeds and notes of the decedent, and a number of papers relating to the settlement of different estates, of which he had been executor, or administrator—all tied up in bundles and labelled. There were also found in this drawer a silver watch, a knife, and a few dollars in silver.

There was much testimony on both sides, and the cause was argued, at length, by the several counsel of the parties, and various questions raised and decided by the court; amongst other points, the counsel for the caveators, asked his Honor to instruct the jury that the drawer containing the deeds, notes, watch, &c., was the place of deposit of the decedent designated by the act of Assembly, because it contained "*the* valuable papers and effects" as contemplated by that act, and that the holograph script in question not being found therein, but in the place described, could not be proved as a will.

His Honor refused so to charge, but held that the receipts, &c., in the drawer where the script was found, constituted it a sufficient place of deposit if the other requisites of the act were found to be complied with. There was no exception brought up by the caveators, as the verdict and judgment were in their favor.

The propounders, however, filed exceptions and appealed, but as these have become unimportant, by the view taken of the case by the court, it is not deemed proper to notice them in this report.

Avery, *Lander* and *Thompson*, for the propounders.
Guion and *Boyden*, for the caveators.

Battle, J. There is one ground upon which the judgment below must be affirmed, which makes it altogether unnecessary for us to consider any other. A holograph script, to be good as a will, must "be found among the valuable papers or effects" of the deceased, or must "have been lodged in the hands of some person for safe-keeping." 1 Rev. Stat. 122, sec. 1. (In the Rev. Code, ch. 119, sec. 1, which, however, does not apply to this case, the holograph script must "be found among the valuable papers *and* effects" of the dec'd). It is not pretended, in this case, that the script was ever deposited with any person for safe-keeping, but it is sought to be established as a will, because of its having been found among valuable papers, or effects, of the deceased. We cannot give our assent to the proposition, that the papers or effects, as proved, were valuable papers or effects of the deceased, and we believe that a proper construction of the act will lead to the conclusion that they were not so.

The statute of frauds in England, in relation to wills, and our act upon the same subject, have in view the same object, namely, the protection of the heirs-at-law, and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose, many forms and ceremonies are required to be observed in the execution of such instruments. With re-

gard to attested wills, the requisites of the English, and our statute, except as to the number of witnesses, are substantially the same. It is well known to the profession how strictly —we may say sternly, the courts, in both countries, have demanded a compliance with these provisions of the law. The same policy must govern us, when we come to decide, whether the requisitions of our statute have been complied with in the execution of a paper-writing, propounded as a holograph will. One alternative requisition of the statute is, that it must "be found among the valuable papers or effects" of the alleged testator. Before we proceed to enquire whether the proof in the case before us comes up to this requisition, it is proper for us to notice that the act does not say "among valuable papers or effects," or "among any valuable papers or effects," but uses the definite article *the*, saying "among *the* valuable papers and effects." In many, if not most cases, the deceased will be found to have kept his notes, deeds, and other papers, together with his money, and other valuable effects, in one drawer, or other place of deposit, and that will be the place where his will ought to be found. If he have more than one such place of deposit for his "valuable papers or effects," and his holograph script be found in either, we will not undertake to pronounce that it shall not be proved as a will; but if one of the places have papers or effects, of little or no value, we certainly cannot say that a script, found there, is among the valuable papers or effects of the deceased. Papers of no appreciable value lying loose and scattered over the bottom of a drawer, cannot, with any propriety, be called valuable papers at all, but they certainly cannot be *the* valuable requisites, when compared with deeds, notes, and other papers, relating to important transactions, found in another drawer, tied up in bundles and labelled. The same remark may be made with regard to an article of property worth only the fraction of a dollar, put in one drawer, compared with several articles worth many dollars, deposited in another. The former cannot be called, in any just sense, *the* valuable effects of the testator. Such was the comparative

condition of the two drawers, as made out, by the proof, in the case before us. In the one, which contained the valuable papers and effects, the script was *not* found, and yet, that is the place where the deceased would almost certainly have put it, if he had intended it to operate as a will disposing of his whole estate. In the other, it was found among loose receipts, an old copy-book, and a purse, which had belonged to one of his deceased children, containing a few pieces of silver, amounting, in all, to eighty cents, and also among several imperfect instruments of a testamentary character. There, the script in question, might well have been looked for, if it were regarded by the writer as yet incomplete, and the maxim, *noscitur a sociis*, might well apply to it.

But it is objected that a construction which would reject a paper, found under the circumstances proved in this case, is too strict, and may disappoint the intention of many persons who wished, and intended to die testate. The reply is, that it will be more likely to uphold the policy of the statute in its attempts to prevent heirs, and next of kin, from being deprived of their just rights. It is not more strict than the construction which has been put upon that clause of the statute which requires the paper to be attested in the presence of the testator; and we think both necessary to accomplish the beneficent purposes of the statute.

This particular objection was decided against the defendants, and the verdict and judgment were given in their favor upon another ground, but as this ought to have been decided for them, and is fatal to the probate of the script as a will, we must affirm the judgment, without reference to the other objections.

Per Curiam. Judgment affirmed.

CHARLOTTE DAWS, *administratrix*, *v.* DAVID TAYLOR.

Where a plaintiff *declares as administrator*, profert of the letters of administration is made in the declaration, and no proof in respect to plaintiff's representative character, is required on the trial.

ACTION of ASSUMPSIT, tried before his Honor, Judge ELLIS, at the Fall Term, 1856, of Cherokee Superior Court.

The plaintiff declared on the defendant's promise, made in the city of Washington, for board and lodging there furnished him. The defendant pleaded the general issue. It was was insisted, on the trial, that the plaintiff should produce her letters of administration, otherwise that she could not recover, and the court was requested so to instruct; but his Honor refused to do so, holding that the plea of the defendant did not put that fact in issue.

Verdict for the plaintiff and judgment. Appeal by the defendant.

Baxter, for plaintiff.
J. W. Woodfin, for defendant.

PEARSON, J. We concur in the opinion of his Honor, for the reason given by him. When a plaintiff *declares as administrator*, profert of the letters of administration is made in the declaration, and no proof in respect to that fact is required on the trial; but when a plaintiff declares *in his own right*, as for a trespass, or for trover, after the property had come to his possession, the fact of his being administrator, constitutes a link in his chain of title, and is put in issue, and must be proved on the trial; no profert of the letters of administration being set out in the declaration. This is a well settled distinction.

PER CURIAM. Judgment affirmed.

D. B. HODGES *v.* N. M. HOLDERBY.

Where one, in the absence of a principal, employs his general agent to carry off goods in the principal's wagon, and sell them for him, contrary to his orders but the latter recognizes the act of the agent, and receives pay for the service of his wagon and team, and of the agent, this does not bind the principal to account for money received by such agent, and not paid to the owner of the goods.

ACTION of ASSUMPSIT, commenced by a warrant, and tried before his Honor, Judge ELLIS, at the Fall Term, 1856, of Watauga Superior Court.

The plaintiff declared for a balance due for money had, and received by him, for the sale of a quantity of bacon.

It was proved, that one McGuire, was employed by the defendant as a clerk in a store, in the County of Watauga, and was his general agent for the transaction of business; that on one occasion, when the defendant was absent from his place of business, he wrote to McGuire to purchase a load of iron, at a given price, and take it down to Rockingham county, and bring back a return load of goods for his store; that the iron was not to be purchased at the price to which he was limited by the defendant. Rather than take the wagon to Rockingham empty, he took in, as a part of his load, a quantity of bacon, belonging to the plaintiff, which at the request of the plaintiff, he sold and received the money for the same. Upon his return to Watauga, McGuire paid the plaintiff part of the money, and informed the defendant what he had done in relation to the bacon, and other things taken off in the wagon, to which the latter replied, "it was all right." The price for hauling the bacon, was paid by the plaintiff to the defendant.

The question was, whether the evidence disclosed an agency from the defendant to McGuire, so as to make the former liable for the price of the bacon. His Honor charged the jury, that the facts set forth, showed such an agency as did make him liable. Defendant excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Gaither, for the plaintiff.
Lenoir, and *Avery*, for the defendant.

Battle, J. The plaintiff's declartion is for money had, and received, by the defendant to his use. Now it is very certain, that when the money was received by the defendant's clerk, McGuire, upon the sale of the plaintiff's bacon, it was not received, either expressly, or impliedly, by the defendant. Up to that time, McGuire, in taking the bacon to market, so far from acting within the scope of the authority given him by the defendant, was acting directly against it; for the defendant had directed him to carry down a load of iron in his wagon. There is no pretence that the defendant was a common carrier, and that McGuire was his servant, employed in the business of transporting goods. The price of the bacon then, was received by McGuire alone, for the use of the plaintiff, and the latter must at that time, have so understood it, and he seems to have acted on that understanding when he accepted a part of the money from McGuire, and paid the defendant for the hauling and sale of the bacon.

The question, then, is whether the expression used by the defendant, when McGuire returned with the wagon, and told him what he had done, that "it was all right," changed the character of the transaction, and made him responsible to the plaintiff for the price of the bacon. The reception of pay for the use of the wagon, and the time and labor of his clerk, in selling the bacon, could not have the effect to make the defendant liable, because he was entitled to it whether McGuire had collected the money or not. Nor are we aware of any principle which can make him responsible by the mere effect of his recognizing the acts of his clerk as all right. The clerk had done several acts not authorized by his previous orders, which the defendant thought proper, under the circumstances, to approve. He certainly did approve, among other things,

of his clerk carrying down, and selling the bacon for the plaintiff, and as the agent of the plaintiff, but it does not necessarily follow, that he thereby intended to assume the responsibility of his clerk's faithfulness in collecting and paying over the price to the plaintiff. In that transaction, we are satisfied from the circumstances, that the plaintiff looked to McGuire alone for his money, and did not think of holding the defendant responsible for it, until he afterwards found that McGuire had been faithless, and had "kept back part of the price."

PER CURIAM. The judgment must be reversed and *a venire de novo* awarded.

STEPHEN L. HOWELL *v.* R. F. JOHNSTON.

Where an administrator assented to the possession of a distributee's supposed share of the estate, upon condition that he should thereafter give a refunding bond, which condition is not complied with, the administrator may recover the property from such distributee.

The possession of the distributee, under such circumstances, is not adverse, and the statute of limitations, for the period of such possession, will not run against the administrator.

THIS was an action of TROVER, tried before DICK, Judge, at the Spring Term, 1857, of Davie Superior Court.

Pleas, general issue, and statute of limitations.

The action was brought for the value of two slaves, Kerr and Amy. It was admitted that the slaves, in controversy, were part of the estate of Wm. F. Kelly, who died in 1848, and that as such, they come to the hands of the plaintiff, who was appointed his administrator at February court, 1849. These slaves were hired for the years 1849, 1850, and 1851. It appeared that at the commencement of this suit, 24th of December, 1854, the slaves were in possession of the defendant, and on the day before that, the plaintiff made a demand of

the property, which the defendant refused to deliver, claiming them as his own.

It further appeared, that at November Term, 1850, of Davie County Court, a petition was filed by all the next of kin and distributees of William F. Kelly, for a division of a large number of slaves belonging to his estate, setting forth that they were tenants in common of the said slaves, and praying the court to appoint commissioners to make a division of them amongst the said petitioners. Commissioners were appointed, and in the month of December, 1850, they proceeded to make a division and allotment of the slaves according to the order of the court, of which they made a report to February, Term, 1851, and the distributees, with the exception of John Kelly, took charge of the slaves allotted, and hired them out for the year 1851, but as to those allotted to the said John, they continued in charge of the plaintiff, and were hired out by him for that year. Some of the next of kin being dissatisfied with the division, it was set aside by consent, and the hires for the year 1851, were accounted for to plaintiff. At November Term, 1851, of the said court, a new order was made for the division of these slaves, and the same commissioners were appointed. They again met on this business on 26th of December, 1851, and made another division, which was reported to the ensuing term of the court, (February, 1852,) and confirmed. Whether the plaintiff was present at these meeting of the commissioners was left uncertain by the testimony. All the slaves thus allotted at the latter meeting of the commissioners, with exception of those designated for John, went into the possession of the several distributees, who gave refunding bonds according to law. Kerr, and Amy, the slaves in question, were again allotted to John Kelly, but he gave no refunding bond, nor did any one do so for him. It appeared, in evidence, that shortly after the 1st of January, 1852, the said John was living with the defendant, who kept a tavern in the town of Mocksville, and had these slaves there in his possession; which possession was continued at that place, either by the said John, or the defendant, until they

were demanded by the plaintiff as above stated. It also appeared, in evidence, that at the time the commissioners were engaged in making the allotment, as the distributees were about to take charge of their several lots, the plaintiff made known to them his intention to retain his right to each lot of the slaves until refunding bonds were given, and that on the evening of the last division, he furnished John Kelly with a bond for him to have executed with sureties.

It was further proved, that about April of 1852, when a trustee, or officer was about to sell, for debt, certain other slaves, which had been allotted to John Kelly, the plaintiff asserted his right to the slaves, and refused to let them be sold until the creditors gave satisfactory assurance that refunding bonds would be executed, and that about three months afterwards, an angry altercation took place between plaintiff and defendant, because the former was insisting upon a refunding bond being executed as to Kerr, and Amy.

It further appeared, that the administration of the estate of Wm. F. Kelly, was not closed, but that there remained outstanding debts against it of more than $4000, and that the other unadministered property in the hands of the administrator, amounted only to about $400.

It was insisted by the defendant's counsel, and the Court was called on to instruct the jury,

1st., That if the consent of the plaintiff, to the possession and division, was unconditional, he could not recover.

2ndly., That if the plaintiff consented to the possession and division, upon condition that each of the distributees should, after the division, give a refunding bond for the share allotted to him, still such a surrender of his right would enure to the benefit of all the distributees, as well those who did not give refunding bonds, as those who did, and that such conditional assent would defeat the right of the plaintiff to recover.

3rdly., That a possession and division made under such conditional assent would be a good possession as to all the distributees, and that such division must be good as to all or none.

The Court charged the first point, as requested by the defendant.

As to the other two, he declined giving them, but told the jury that the division might be effectual as to part of the distributees, and not so as to others; and that if they should find that the plaintiff only parted with his possession on condition that each of the distributees should give a refunding bond for the share allotted to him, or her, those who complied would acquire a right of property and possession, but that as to John Kelly, who failed to comply with the condition, he would acquire no such right. The defendant excepted. Verdict for plaintiff. Judgment and appeal.

Mitchell, for the plaintiff.
Boyden, for the defendant.

Nash, C. J. Several interesting questions are presented by this case.

First: Can an executor give a qualified assent to a legacy?

Secondly: Where there are several legatees, who are interested in a joint fund, can the executor give a conditional assent to the legacy to one, and refuse it to another?

A bequest, properly made in a will, vests in the legatee upon the death of the testator, but he cannot take possession until the executor gives his assent. It is necessary that the legal estate should remain in the executor, as the personal property of the deceased constitutes, in general, the primary fund for the payment of the debts of the testator. By our law, the executor has two years to settle up the estate. Upon the first point, Mr. Williams, in his 2d vol. of the Law of Ex'rs., 848, is very explicit. After expounding the law concerning the executor's assent to a legacy, he says: "The assent of the executor may be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands; or in case of a devise of a term of years, provided the legatee will pay the rent in arrear at the testator's death. And in either case, if

the condition be not performed, there is no assent." For this, he cites Wentworth's Office of Executor, 429—the 14th edition —a work of the highest authority.

But, to this principle, there is a reservation that the condition must be such as the executor has authority to impose; as, if he declare his assent, provided the legatee should go to some particular place, to perform some business for the executor's personal benefit, the assent would be considered absolute. So, if the assent be on a condition subsequent; as, provided the legatee will pay the executor a certain sum annually, such condition is void, and a failure in performing it shall not divest the legatee of his legacy. So, where a man devises a term to J. S., and the executor assent that J. S. and J. W. shall have the term; here J. S. shall have the term absolutely and solely. 4 Coke's Rep. 28. Lord Coke, in the same place, says "or that J. S. shall have it on condition," it is an absolute assent. He evidently means such a condition as is annexed to the assent to the devise to J. S.—namely, any condition which the executor has no authority to make. In this light, Mr. Williams considers the expression of Lord Coke, for he cites him as authority for the exception which he states as to conditional assents by the executor.

Let us, now, bring our case to the test of the enactment of our law upon the subject. By the 18th sec. of the 46th chap. Rev. Statutes, it is made the duty of the executor to pay over to the legatees, or distributees of a deceased person, after the expiration of two years from the granting of the letters testamentary, all the personal estate to which they are entitled, "such person, or persons, or some other for them, giving bond with two or more able sureties, that if any debt, &c., they shall respectively refund, and each pay his, or her, rateable part, &c." By this act it is made the duty of the executor, before assenting to a legacy, or to legacies, to take from each legatee a refunding bond; and this is as well for the security of the executor, himself, as for that of the creditors of the deceased. The administrator here, after the commissioners had divided the negroes, as stated in the case, had a right to

retain them in his possession until the several legatees, to whom they were respectively allotted, should give refunding bonds as required by law. It is stated in the case, that all the distributees complied with the condition, and received their shares of the negroes, except John Kelly, who never gave a refunding bond; and until he does so, the slaves allotted to him, still remain in the legal possession of the administrator, for he has not assented to the distributive share, the condition not being complied with.

As to the second question: A general assent, by an executor to one of two legatees of a specific property, is an assent to both, as if a lessor for years bequeath the rent to A, and the land to B, an assent to one is an assent to both. See 2 Wm's. on Ex'rs., 488; Roper on Legacies, 738. Here the distributees were tenants in common of the slaves, and while so, an assent by the administrator, to one of the tenants, would have inured to the benefit of all. But after the division by the commissioners, the tenancy in common was severed, and each distributee acquired a right to the slaves allotted to him, still leaving to the administrator his right to object to any of the distributees taking possession of those allotted to him, until he had complied with the requirements of the law. It was, therefore, not in the power of the Court to give the jury the 2nd and 3rd instructions as requested by the defendant's counsel.

The statute of limitations cannot avail the defendant; for until John Kelly complied with the condition upon which the negroes went into his possession, he was the bailee of the plaintiff, and as he lived with the defendant Johnston, the possession of Kelly was his possession.

PER CURIAM, There is no error; and the judgment is affirmed.

FRANCIS MATHIS *v.* ANDREW BRYSON.

Where a judgment rendered before a justice of the peace is appealed from, and the parties, by consent, withdraw the appeal, the judgment is restored.

The payment of a lesser sum than the amount claimed, where the amount in question is unascertained, will support the plea of accord and satisfaction, if received in discharge of such claim.

This was an action of DEBT on a former judgment, tried before ELLIS, Judge, at the Fall Term, 1856, of Jackson Superior Court, and brought to this Court by direct appeal from the judgment of a magistrate.

The plaintiff offered, in evidence, the former judgment sued on, from which the defendant had appealed, and upon which was an endorsement of such appeal, and subsequently a withdrawal of the appeal by the appellant. One Wilson, the justice, who tried the case, testified that after the appeal was taken, and as he was carrying the papers to court, the parties came to him, when the appellant (the defendant) told him not to return the appeal to court, but to hand it back to the officer, which he did. He understood from them that they intended to settle the matter without its going into court.

One *Henderson*, for the defendant, swore the parties agreed to withdraw the appeal and refer the case to arbitrators; that the parties met to have the matter submitted to referees, but that the persons selected did not meet. That the defendant borrowed a dollar from him, which he handed to the plaintiff, who, on receiving it, seemed satisfied. He understood from the parties that they had settled the matter, and all seemed satisfied.

A credit of one dollar was endorsed on the judgment, and was admitted on the trial below.

Upon these facts, the plaintiff insisted on his right to recover the amount of the judgment, deducting the sum of one dollar.

The defendant contended that the judgment had been vacated by the acts of the parties, and that there was an accord and satisfaction proved in the case.

The court charged the jury that the withdrawal of the appeal, restored the judgment. He charged also, that there was evidence of a payment of one dollar on the judgment, but that there was no evidence of an accord and satisfaction of the judgment, and that the plaintiff was entitled to recover for the balance, after deducting one dollar.

Verdict for the plaintiff, and judgment accordingly. Defendant appealed.

J. W. Woodfin, for the plaintiff.
Baxter, for the defendant.

Nash, C. J. There is error. The action is brought on a former judgment. The magistrate, who gave the judgment, proved that, after it was rendered, the defendant appealed to the Superior Court, and while he was on his way to return the papers to court he was met by the parties, when the appellant told him not to return them to court. He understood from the parties, that they intended to settle the matter without going to court. Another witness testified that the parties agreed to withdraw the appeal and submit the matter to referees; that the referees did not meet, and the defendant borrowed a dollar from him; that plaintiff took it and seemed satisfied.

The jury were properly instructed that the withdrawal of the appeal, before the cause was returned by the magistrate to the Superior Court, restored the judgment to its original force. Parties can, before an appeal from a magistrate reaches the appellate court, stop the appeal, and in doing so the judgment stands, as if no appeal had been taken.

But we do not agree with his Honor, that there was not proper evidence of an accord and satisfaction. We think there was, and that the jury ought to have been so instructed. The parties were engaged in a law-suit, which might prove a troublesome, and expensive one, and while pondering on it, the defendant borrowed from the witness a dollar, which he handed to the plaintiff, who took it, and they both seemed

satisfied, and said they had settled it. What was the intention of the parties in this transfer of the dollar, was a matter of enquiry for the jury. The payment of a less sum than that claimed, will support the plea of accord and satisfaction where the amount is unascertained and in dispute, if it is received in discharge of the amount claimed. *Pinnell's* case, 5 Co. Rep. 117; *Smith* v. *Brown*, 3 Hawks' Rep. 580; Stark. on Ev. 2 v. pt. 1 in Note; *State Bank* v. *Littlejohn*, 1 Dev. and Bat. 565.

PER CURIAM, Judgment reversed, and a *venire de novo* awarded.

ZEPHANIAH McCURRY *v.* JAMES McKESSON, *administrator*.

There was an agreement to pay a debt in good cash notes, which was barred by the statute of limitations; afterwards, within three years of the bringing of the suit, the plaintiff asked the defendant for the money, to which the defendant said he had paid part of it, and asked how much was the balance, which the plaintiff stated to be a certain sum; the defendant then asked if he could still pay in good cash notes; to which the plaintiff replied he could do so; upon which the defendant said he would settle and make all right: it was *held* that this took the original promise out of the operation of the statute.

Where a promise is barred by the statute of limitations, and a new promise is made between the same parties, to do the same thing, the old promise is revived, and the replication to the statute, will be a general, and not a special one.

THIS was an action of ASSUMPSIT, tried before ELLIS, J., at the Fall Term, 1856, of Yancy Superior Court.

The defendant relied on the statute of limitations.

The claim of the plaintiff was for the recovery of money which the defendant's intestate owed for a note of $75, which he had bought of the plaintiff. There was evidence tending to show the indebtedness of the defendant's intestate, and his agreement to pay for the paper in good cash notes. This

agreement, however, as proved, was more than three years before the bringing of the suit.

A new promise, or acknowledgment of a subsisting debt, was relied on to repel the bar of the statute. Upon this point, one *McCurry* swore that, in the year 1852, within less than three years of the bringing of the suit, he heard the plaintiff demand payment of the defendant's intestate of a debt which he owed him for the purchase of a note. Intestate replied, "you know I have paid fourteen or fifteen dollars on it;" to which the plaintiff assented. He then asked the plaintiff how much he claimed; to which the plaintiff replied, "sixty odd dollars." The intestate then asked the plaintiff if he would take good cash notes according to the original contract. The plaintiff replied that he would if the notes were good. To which the defendant's intestate made answer, that they should be good, or he would make them good. He further said "he could not settle then, as his papers were at his residence, (some miles distance); but that he would get them, and make the settlement, and make it all right."

The only question was whether the testimony of McCurry took the case out of the operation of the statute of limitations; which question was, by the consent of the parties, reserved by the Court, with leave to set aside the verdict and order a nonsuit if the Court should be of opinion against the plaintiff.

Afterwards the Court declared his opinion to be that, a fair interpretation of the conversation of the plaintiff's intestate, was, that after a reference to his papers, he would settle and pay the balance due in good cash notes, which was not a promise to pay in money, and, consequently, there was no new promise which would prevent the operation of the statute.

Whereupon, the verdict was set aside, and a nonsuit entered according to the agreement, from which judgment the plaintiff appealed.

Edney, for the plaintiff.
Gaither, and *N. W Woodfin*, for the defendant.

Battle, J. The case of *Falls* v. *Sherrill*, 2 Dev. and Bat. Rep. 371, which has recently been referred to, with approbation in the case of *Thompson* v. *Gilreath*, 3 Jones' Rep. 493, is a direct authority to show, that where the old promise is barred by the statute of limitations, and the new one is relied on to repel the effect of the statute, the declaration must be upon the first assumpsit, and the second promise revives the first, or is evidence of similar continued promises from the time the contract was made. This is where the assumpsit is between the same parties, and to do the same thing; and in such a case the replication to the plea of the statute, will be a general and not a special one; for it is manifestly necessary only to traverse the plea, and conclude to the country. 1 Chitty's Pl. 583.

In the case now before us, the original, and the new, promises were between the same parties, and it was to do precisely the same thing; for the defendant's intestate referred to the original contract, and said, in substance, he would pay the debt in good cash notes according to it, and to this plaintiff assented. In this respect, then, the case is materially different from that of *Taylor* v. *Stedman*, 13 Ire. Rep. 97, where the original promise was to pay in money, and the new promise proved, was to pay in good notes, or judgments.

In that case, the replication alleging a promise to pay in money, it was properly held that the testimony did not support it, and the plaintiff failed in his action, because his proof varied fatally from his allegation. In the present case, the declaration is upon the original promise to pay in good cash notes, and that is sustained, under the general replication, by proof of a new promise to pay in the same way.

The plaintiff then is entitled to recover, if the promise upon which he relies to take his case out of the operation of the statute, identifies the debt with sufficient certainty, according to the rule established by several recent decisions of this court. *Moore* v. *Hyman*, 13 Ire. Rep. 272; *Loftin* v. *Aldridge*, 3 Jones' Rep. 328. That rule is that, to repel the statute of limitations, there must be a promise to pay the debt sued on,

either expressed or implied, and the terms used must be certain in themselves, or must have sufficient certainty to give a distinct cause of action by aid of the maxim, *id certum est quod certum potest reddi*. This, we think, he has done.

The testimony, relied upon to prove the new promise refers to the original contract too plainly to be misunderstood, and the amount of sixty dollars is ascertained beyond a question. The word, "odd," may be rejected as surplusage, upon the maxim, *utile per inutile non vitiatur*. See *Collett* v. *Frazier*, 3 Jones' Eq. Rep. 80.

PER CURIAM, Judgment reversed.

SAMUEL SMITH *v.* THOMAS S. DEAVER *et al.*

One who prosecutes another for a perjury, in swearing to a matter that could not amount to a perjury, (being an immaterial fact) cannot be protected by proving the truth of his charge.

ACTION on the CASE for a malicious prosecution, tried before CALDWELL, Judge, at the Spring Term, 1857, of Madison Superior Court.

The defendant H. B. Deaver had been prosecuted for forgery, in altering the date of a certain note, executed by one Bradley to one Carter, on which a warrant had issued in the name of Carter to the use of said Deaver. The note in question, with the warrant thereon, (which had never been served) came to the hands of the plaintiff by a trade between him and H. B. Deaver. On the trial of the said Deaver, for the forgery, the warrant above mentioned was produced, and it appearing that the face of the warrant had been altered, so as to make it read "to the use of Samuel Smith," instead of "to the use of H. B. Deaver," the plaintiff, who was a witness, was asked, whether he did not make this alteration; which he denied. For this denial, the defendants took out a State's

warrant, for perjury, against the plaintiff, which, having been returned before a justice of the peace, was dismissed at the defendants' cost. This action, for a malicious prosecution, was then brought against the defendants for suing and prosecuting this warrant.

Upon the trial of the cause below, the defendants offered to show that the plaintiff did make the alteration in the face of the civil warrant above stated. To which evidence the plaintiff objected, upon the ground that, even if true, it did not amount to probable cause to proceed against him for perjury, for that the statement which he made, in relation to the alteration of the *warrant*, was not pertinent to the issue then on trial, which was as to the alteration of the *note*, and that if he had stated untruly, in that respect, he could not be guilty, and therefore it furnished no probable cause for the defendants' proceeding against him. He called upon his Honor so to instruct the jury.

The court admitted the evidence, holding that it amounted to probable cause for taking out the warrant against the plaintiff, and refused to charge as requested. Plaintiff excepted.

There was a verdict and judgment for the defendants, and an appeal by the plaintiff.

Edney, for the plaintiff.
Gaither, for the defendants.

Battle, J. The question, for the alleged answer to which, the defendants instituted a prosecution for perjury against the plaintiff, was manifestly immaterial, and the enquiry is whether proof, in the present action, that it was false, is sufficient to show a probable cause for the prosecution. What is probable cause is a question of law, to be decided by the court upon the facts, as they may be found by the jury. *Beale* v. *Robinson*, 7 Ire. Rep. 280; *Vickers* v. *Logan*, Busb. Rep. 393. As a guide to the court, it is defined to be "the existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having

been guilty, was guilty. It is a case of apparent guilt as contradistinguished from real guilt. It is not essential, that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time, as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others, as well as his own, to institute a prosecution; not that he knows the facts necessary to ensure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offence." See the case of *Munns* v. *Dupont*, 2 Brown's Rep. Ap. 65, cited in *Cabiness* v. *Martin*, 3 Dev. Rep. 454.

This reasonable ground of suspicion may involve a question of law as well as of fact; for certainly, no rational and prudent man, having a due regard to the rights of others, as well as his own, would rashly commence a prosecution for an act which the law did not hold to be criminal. If he believed that the person suspected had committed an offence, and did not know that it was an indictable offence, he ought to make enquiries of those who did know whether it was so or not. Should he neglect this prudent precaution, he will not be protected by proving the truth of his charge. Thus in the case above referred to of *Cabiness* v. *Martin*, a witness on a trial, swore "that a magistrate, upon the return of a State's warrant before him, had told the defendant therein, that unless he gave his note, &c., *he would send him to jail*." The The magistrate had, in truth, said to the defendant that, "unless he gave his note, &c., *he would bind him to appear at court*." For this variance, the witness was prosecuted for perjury, and upon being acquitted, brought an action against the prosecutors for a malicious prosecution.

The court held that, under the circumstances in which the words were spoken, it was immaterial whether the magistrate used the one set of words or the other, and that "the difference between the words spoken by the magistrate, and the words which the plaintiff swore he made use of, was not suffi-

cient to excite, in the minds of the defendants, a reasonable suspicion that he had committed perjury."

In the case now before us, the question which was put to the plaintiff, whether he had made an alteration in the *warrant*, was plainly immaterial to the enquiry whether the defendant, in that trial, had committed forgery by altering the date of a *note;* and we think no rational and prudent man, who duly regarded the rights of others, as well as his own, would, without enquiry whether a false answer to such a question was perjury, have instituted a prosecution for that offence. In charging that the defendants had made out a case of probable cause, we are of opinion that his Honor erred. In consequence of which, the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM, Judgment reversed.

JAMES M. WRIGHT *v.* J. & E. B. STOWE.

If water be ponded back on the land of another by the erection of a mill-dam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not.

A witness is not competent to testify to what a deceased witness swore on a former trial, unless he says he is able to state the substance of all that was deposed to by the deceased witness.

An exception to the competency of the witness, need not set out the testimony which the witness was called to give. (*Kimel* v. *Kimel*, 4 Jones' Rep, 121. reviewed.)

THIS was a PETITION for damages for ponding back water upon plaintiff's land, tried before BAILEY, J., at the Special Term, July, 1857, of Lincoln Superior Court.

Upon the trial of this cause, there was much testimony on both sides, which need not be stated. His Honor instructed the jury, among other things, that "if the water was thrown up the branches, which ran through the low ground, or against the

banks of the river, and was taken up by absorption, and did no injury, whatever, to the plaintiff's land, he would not be entitled to nominal damages." To which the plaintiff excepted.

A witness was called to prove what one Larkin Stowe, a deceased witness, had testified on a former trial of this cause. Upon a preliminary examination, the witness said he was able to state the substance of all that Mr. Stowe deposed to on that occasion, on the subject of damage, but was not able to give the substance of his whole evidence in the cause. The witness was objected to by the plaintiff, but admitted by the Court. Plaintiff again excepted.

Verdict and judgment for the defendants; and the plaintiff appealed.

Boyden, and *Hoke*, for the plaintiff.
Lander, *Guion*, and *Thompson*. for the defendants.

Battle, J. The last proposition in his Honor's charge upon the subject of damages, cannot be supported upon a proper construction of the 15th sec. of 74th ch. of the Rev. Statutes. (See Rev. Code, ch. 71, sec. 14.) If the water be, in fact, ponded back upon the plaintiff's land, he will be entitled to recover, at least, nominal damages; the statute being intended to change the form and details only of the remedy, and not the principle of the action. See *Gillet* v. *Jones*, 1 Dev. and Bat. Rep. 339. For this error, however, his Honor is not responsible, as his charge is fully sustained by what was said, inadvertently, by this court, in the case of *Kimel* v. *Kimel*, 4 Jones' Rep. 121. The dictum, which caused the error, was not necessary to the decision of the case, the judgment in which we still think was right. We cannot but regret the error, though it occurred *arguendo* only, and are glad to avail ourselves of this early opportunity of correcting it. We thought, at the time, that the construction which we placed upon the section in question, was necessary to discourage the filing of petitions in cases of trivial damages, caused by the erection of mill-dams, which it was, manifestly, the design of the act to

do, but we find that object sufficiently accomplished by the subsequent proviso, which declares that, when the jury shall assess damages for the petitioner under a certain sum, to wit, five dollars, he shall recover no more costs than damages. See Rev. Stat., ch. 74, sec. 15; Rev. Code, ch. 71, sec. 14.

As a *venire de novo* must be awarded, on account of the error to which we have referred, we might abstain from expressing an opinion on the question of evidence which was raised on the trial, but the decision of his Honor is in such direct opposition to the opinions expressed in this Court upon the subject, that we feel it our duty to call the attention of those who may be concerned in the next trial, to it. In the case of *Ingram* v. *Watkins*, 1 Dev. and Bat. Rep. 442, the Court held that, to impeach the credibility of a witness, by proving that he swore differently as to a particular fact on a former trial, it was not necessary that the impeaching witness should be able to state all that the impeached witness had deposed. But in delivering the opinion of the Court, GASTON, Judge, distinguished it from the case of a witness who was called to prove what a deceased witness had proved on a former trial. As to the latter, he said, "here it is required that the secondary evidence shall be full, because it is offered as a substitute. The testimony of the deceased witness should be placed before the new, as the law required it to be placed before the former, triers.' Both are entitled, not only to the truth, but the whole truth. The copy must be ascertained to be faithful before it is admitted as a representative of the original. Besides, to receive an avowedly imperfect account of what had been formerly testified, in lieu of the former testimony itself, would be to encourage the party to offer partial, instead of full, secondary evidence. He would be interested to seek out such witnesses as remembered only those portions of the former testimony that made in his favor." It seems, then, that a witness is not competent to testify to what a deceased witness swore, on a former trial, unless he says he can state the *substance of all* that the dec'd. witness testified; and such appears to have been recognized

as the proper rule in the cases of *Ballinger* v. *Barnes*, 3 Dev. Rep. 460, and *Jones* v. *Ward*, 3 Jones' Rep. 24.

The objection made here by the defendants' counsel, that the testimony which the witness was called to give, is not set out in the bill of exceptions, so that the Court may say whether it was material, or not, does not apply; because the admissibility of the evidence was resisted upon the ground of the *incompetency of the witness*, and not the *immateriality of his testimony*. In the case of the *State* v. *Jim*, 3 Jones' Rep. 348, the distinction between the two objections, is clearly pointed out; it being there said, "It is only where evidence is ruled out on account of the *matter* that it is necessary to set out, in the statement of the case, what the party expected, or offered, to prove, so as to enable the court to judge of its materiality."

Per Curiam, Judgment reversed; and a *venire de novo*.

ANDERSON DULA *v.* J. AND C. J. COWLES.

It is error in a Judge to leave a question to the decision of the jury without some evidence bearing on such question.

Where a sum has been erroneously found by the jury against the defendant, it will not cure the error for the plaintiff to *offer* to remit the amount thus erroneously allowed, without actually doing so.

This was an action of assumpsit brought up by direct appeal from the judgment of a justice of the peace, to the Superior Court of Wilkes, where it was tried before Dick, Judge, at the last Spring Term.

The suit was brought for two parcels of pork and some articles delivered by the plaintiff to the defendants.

It was admitted by the parties that the plaintiff contracted to deliver to the defendants fifteen hundred pounds of pork on the first of January, 18—; that the price to be allowed for it

was six dollars per hundred; that part of it was to be applied to the discharge of two notes—a justice's judgment, and a book account, which the defendants had against the plaintiff, and that the remainder of the price was to be paid, one-half in goods, and the other half in cash. It was further admitted, that no pork was delivered on the 1st of January, but that on the 9th of that month, the plaintiff delivered 270 lbs., and a credit was entered by the defendants on one of the notes for the price of that quantity; that on the 24th of the same month, the plaintiff delivered 760 lbs., when both of the notes were delivered to the plaintiff, and an order given him by the defendants directed to the officer who had the judgment above mentioned, instructing him to deliver it to the plaintiff; that the balance of the price of the pork delivered, was entered to the credit of the plaintiff on the store-books of the defendants. The plaintiff then called on the clerk of the defendants, a *Mr. Martin*, to examine and see how the account stood on the books, when it was ascertained, by him, that there was a balance in favor of the plaintiff of $18,49.

The plaintiff then demanded this balance, which the defendants refused to pay, alleging that the whole quantity of pork had not been delivered according to the contract; saying also, that when it was all delivered, one-half of it was to be paid for in goods. The plaintiff then said he would deliver the remainder of the pork on the next day, and he would then see whether the defendants would not pay him.

The plaintiff failed to deliver any more pork, but sued out a warrant for the $18,49.

It appeared, in evidence, that seven dollars of the balance, coming to the plaintiff, was for some corn—some beef, and a raw hide, delivered by the plaintiff to the defendants.

The court charged the jury, that by the terms of the contract, as admitted by the parties, the plaintiff was not entitled to recover any part of the price of the pork until the whole quantity of 1500 pounds was delivered, unless the plaintiff had been released by the defendants from the performance of

the remainder of the contract; that when parties entered into a parol contract, they could alter, or modify the terms of it, if they thought proper to do so; and that it was for the jury to decide, from the evidence before them, whether the defendants had released the plaintiff from his obligation to deliver the balance of the pork or not; that if, from the facts of the defendants' delivering up the notes, giving an order for the judgment, and entering a credit on the books, they should believe he had so released the plaintiff, the latter would be entitled to recover for the remainder of the price of the pork after discharging the debts specified; that as to the other articles, he had an undoubted right to recover the price, to wit, seven dollars. Defendants excepted.

Verdict for the plaintiff for $18,49.

At the suggestion of the court, the plaintiff's counsel offered to remit all of the recovery except seven dollars due for the undisputed articles.

Judgment and appeal by the defendants.

Boyden, for the plaintiff.
Mitchell, for the defendants.

Pearson, J. When this case was before us in August Term, 1855, 2 Jones' Rep. 454, we decided that the plaintiff could not recover, because, after performing a part, he had refused to perform the residue of the agreement. There was no evidence to vary the case in this particular, and it was error to leave it to the jury to decide whether or not the defendants had released the plaintiff from his obligation to deliver the balance of the pork. Delivering up the notes, giving an order for the judgment, and entering the balance in the books as a credit to plaintiff, was in exact pursuance of the original contract, and could be no evidence of its release, or the substitution of a new one.

"The offer" of the plaintiff's counsel to remit the recovery to seven dollars, the amount due for the corn, beef, and raw hide, although made at the suggestion of the court, cannot

cure the error. The plaintiff ought to have remitted the amount absolutely, so as not to take a chance in this court for the whole.

PER CURIAM, Judgment reversed, and *a venire de novo*.

JOHN P. HOUSTON, *et al. administrators*, *v.* JAMES MOORE, *et al.*

Where A sold a slave to B, and took a bond for the purchase-money, giving at the same time, a bill of sale for the slave, the surrender of the bond to the obligee afterwards, without its being discharged, is not evidence in a suit brought by B for the detention of the slave.

THIS was an action of REPLEVIN, for slaves, tried before BAILEY, Judge, at the Fall Term, 1857, of Union Superior Court.

The plaintiffs derived title from one Jane Moore, by a bill of sale, executed by her to the plaintiffs' intestate, in which was expressed a consideration of $500. The slaves in question were taken possession of by plaintiffs' intestate, and while in possession of an agent of his in South Carolina, were taken possession of by the defendants.

The defendants proposed to prove by Jane Moore, and by her sister, Mrs. Carns, that at the time of the execution of the bill of sale in question, a controversy had arisen between the witness, Jane, and the administrator of Milton Moore, with regard to the title of these slaves; the latter claiming them as a part of the assets of his intestate's estate; that a note was executed by the plaintiffs' intestate to the witness, Jane Moore, which it was agreed, should not be paid, and which was afterwards surrendered up to the plaintiffs' intestate, and destroyed; and that Armfield, the intestate, was to defend the lawsuit, and account to her for the slaves, on certain specified conditions, if the suit went in her favor. This testimony was rejected by the court, and the defendants excepted.

Verdict for the plaintiffs. Judgment; and appealed by the defendants.

Wilson and *V. Barringer*, for the plaintiffs.
Lander and *Avery*, for the defendants.

Nash, C. J. The testimony, rejected in this case, was properly rejected. It was perfectly immaterial, and could have no proper influence on the minds of the jury in coming to a correct conclusion.

The plaintiffs derived title to the negroes in question under a bill of sale, from Jane Moore, the consideration mentioned being $500, which was secured by the note, or bond, of Needham Armfield, the purchaser, the plaintiffs' intestate. The defendants offered to prove, by Jane Moore, and her sister, Elizabeth Carns, that, at the time of the execution of the bill of sale, a controversy had arisen between Jane Moore and the administrator of Milton Moore, as to the title to the slaves, and it was agreed, between Jane Moore, and the intestate, Armfield, that the bond given to secure the purchase-money, should not be paid, and it was, accordingly, delivered up and destroyed. Upon objection by the plaintiffs, the testimony was ruled out. No reason is given for the ruling of the court, but the decision was correct. Though the bond was given up and destroyed, the bill of sale was not. That remained still in force, and under it the legal title was in Armfield, the intestate. It is well established that it is the duty of the court to exclude from the jury all immaterial evidence, for it has a direct tendency to confuse and mislead them. Now, whether the bond given for the purchase-money was destroyed or not, could not effect the legal claim of Armfield, who still held under the bill of sale.

There was no error in rejecting the evidence.

There are other objections to the testimony of Mrs. Moore, which do not apply to her sister, and which are not considered by the court.

Per Curiam, Judgment affirmed.

A. J. WARDEN *v.* REASON PLUMMER *et al.*

Where A won a justice's judgment from B at a game of cards, unfairly played, and took from the defendants in the judgment, a bond payable to himself for the amount, upon which he brought suit, and to which the statute against gaming was pleaded, it was *Held* that he could not recover.

THIS was an action of DEBT on a bond, tried before ELLIS, Judge, at the Special Term, June, 1857, of Ashe Superior Court.

Plea, statute against gaming.

One Draughn held a judgment, in his favor, rendered against the defendants by a justice of the peace. The plaintiff and Draughn played at cards, and the plaintiff won the said judgment, which was delivered to him. The plaintiff took the judgment to the defendants, and representing himself as the owner, obtained from them the bond in controversy, in lieu of it, they being ignorant that the plaintiff had obtained the same by gaming.

The defendants afterwards paid Draughn the money on the debt. There was evidence that the gaming was unfair.

The Court was of opinion, and so instructed the jury, that the gaming between the plaintiff and Draughn, even though unfair, would not affect the contract between the plaintiff and the defendants; that the false representations in procuring the bond, and want of consideration, could not be enquired into in a court of law, the instrument being under seal. Defendants excepted to this instruction.

There was a verdict and judgment for the plaintiff. Defendants appealed.

Mitchell, for the plaintiff.
Avery and *Lander*, for the defendants.

PEARSON, J. His Honor misapplied the rule, that to avoid a deed, there must be fraud in the *factum*, and not simply a fraud in procuring the party to execute it.

The rule is well established. It rests upon the ground, that if the execution of a deed is procured by a *naked lie*, or other management and undue influence, involving matter of conscience, a court of law cannot treat it as void, because it is the deed of the party, which he *intended to execute*, and the issue being on the plea of *non est factum*, must be found against him. But it is a rule equally well established, that a bond, which obliges a party to do an illegal act, or the consideration of which is against the policy of the law, is void, and will not be enforced in a court of justice. It rests on the broad ground, that no court will allow itself to be used when its judgment will carry out and consummate an act that is forbidden by law. The suggestion that a court of Equity will take the matter in hand as an affair of conscience, and enjoin the collection of the judgment, is not sufficient to induce a court of law to give a helping hand in furtherance of an unlawful act.

The question is which of these two rules governs our case.

The distinction between a deed, whereby an estate is created, and a deed whereby a *right*, or *chose in action* merely, is created, may serve to point out the dividing line, and enable us to solve the question.

When the thing is *done*, and the estate vests, so that the contract is executed, as in the case of a feofment, or other conveyance of land, the estate cannot be defeated by a condition which is unlawful; for the *condition is void*, and so the estate is absolute. In other words, the law will not interfere, and the estate is left where it was put by the act of the parties, on the effect of the deed.

But where the thing is *not done* but in *fieri*, the contract being executory, as in case of a bond, if a condition which is unlawful be annexed, *the bond*, as well as the condition, is void; for the court will not interfere to enforce it. This distinction is well settled. See Coke Litt. Chapter "Conditions." It is now equally well settled, although at one time there was much controversy in regard to it, that in respect to bonds, the principle is not confined to cases where the unlawful nature

or purpose is expressed in a condition, but extends to all cases where the consideration is unlawful and the object of the party is illegal, and the purpose is to enable him to reap the fruits of his iniquity, and to accomplish, and carry into effect, an act which is not simply against conscience, but is forbidden by law. These matters, showing the consideration and purpose of the bond, may be proven by parol evidence, otherwise the law might be easily evaded. *Collins* v. *Blantern*, 2 Wilson's Rep. 341. Same case, 1 Smith's leading cases, 154, and notes. In the present case, the act of the plaintiff, to wit, his unfair gaming with Draughn, was not only illegal by force of the statute against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law; *Webb* v. *Fulchire*, 3 Ire. 485. To enable the plaintiff to accomplish and reap the fruits of this unlawful act, he was under the necessity of procuring the execution of the bond now sued on, and, according to the doctrine above announced, he has no right to ask a court of justice to lend him a helping hand. Indeed, no court can aid him, and be true to itself. If one steals a horse and sells him, taking a bond for the price, or if one procures a bond to be executed by means of a forged order, or by passing counterfeit money, a court of justice will not aid him by enforcing payment of the bond. In all these cases, the principle which governs is this: If, supposing the money to have been paid, it could be recovered back by an action at law, the court will not give judgment on a bond given to secure the payment of the money; for the party cannot be *in a better situation by taking a bond*, than if he *had received the cash*. This would be the result if an action could be maintained on the bond; or else the court must involve itself in the absurdity of giving judgment on the bond, and afterwards giving judgment requiring the money to be paid back!

The dividing line between this class of cases, and those where a court of law will give judgment on the bond, leaving the defendant to seek relief in Equity, if there be any equi-

table ingredients involved, is this: Where the money, if paid, can be recovered back in an action at law, the court will not give a judgment on the bond, and it is treated as void. But if there be nothing in the transaction, which would give the party a right to recover back the money in an action of law, supposing it to have been paid, his relief is, if he has any, in a court of Equity; for there is in such cases no ground upon which a court of law can treat the deed of the party as a nullity.

PER CURIAM. Judgment reversed, and a *venire de novo*.

HIRAM A. FORNEY *v.* BARTLETT SHIPP.

Where one contracts for work to be done for another, without disclosing his agency, he is personally liable, although the workman finds out the agency after the contract is made, and before the work is begun.

Mutual promises constitute a sufficient consideration for the support of a contract.

Where an agent is liable on a contract made for the benefit of a third person, by reason of not disclosing his agency, he cannot avail himself of a debt due by the plaintiff to such third person, as a set-off.

ACTION of ASSUMPSIT, tried before BAILEY, J., at a Special Term, July, 1857, of Lincoln Superior Court.

The evidence, was that defendant said he wished to employ the plaintiff to superintend the iron-works at Madison Forge; that if he would undertake the business, he would give him $12,50 per month, as long as he continued to work; to which the plaintiff agreed.

Accordingly, the plaintiff took charge of the iron-works, and the first entry he made in the book, in which he kept his account, was as follows: "June 7th, 1852. Commenced work this day for Wm. Shipp; employed by Bartlett Shipp, at $12,-50 per month."

It was further proved, that plaintiff acted as superintendent about two years and six months, and during that time issued

many due bills, payable in iron, and signed the same as agent for Wm. Shipp; that he also signed many receipts in the same way, and made entries in the book of accounts as agent. It was further proved, that plaintiff sold iron, and iron-ware, to a large amount, for Wm. Shipp.

The court charged the jury that, if the defendant made the contract in his own name, and engaged himself to pay the plaintiff for his work, without disclosing the name of his principal, (if he had one), he would be responsible in this action, and the jury should so find; but if the defendant disclosed his principal, or if the plaintiff contracted with him, knowing that the defendant was making the contract for, and on account of, William Shipp, and not for himself, he would be obliged to resort to the principal, and not to the agent, and the plaintiff in that case could not recover.

The defendant's counsel asked the court to instruct the jury that, although the defendant contracted in his name without disclosing his principal, yet, if the plaintiff found out, after the contract was made, and before he commenced work, that he was acting for Wm. Shipp, he could not recover in this action.

The court declined giving such instruction; and the defendant excepted.

The defendant relied upon the fact that the plaintiff had sold iron, and castings, to a large amount, belonging to Wm. Shipp, and insisted upon this counter claim as a set-off.

But the court instructed the jury that, this claim, in favor of Wm. Shipp, was not applicable as a set-off in this suit, against the defendant. Defendant again excepted.

There was a verdict in favor of the plaintiff, and judgment was rendered thereupon. Defendant appealed.

Lander and *Avery*, for the plaintiff.
Thompson and *Hoke*, for the defendant.

Pearson, J. There is no error. We are to assume from the verdict "that the defendant made the contract in his own name, and engaged himself to pay the plaintiff for his work,

without disclosing the name of his principal." The plaintiff having done the work, why should not this contract be binding?

It was said in the argument, that there was no consideration in respect to the defendant. The proposition is not true. The contract was supported by the consideration of *mutual promises* between the contracting parties.

The fact that the plaintiff "found out," before he commenced work, that the work was to be done for Wm. Shipp, and not for the defendant, (his father), was immaterial; and his Honor properly declined to give the instruction asked for. Suppose William Shipp to have been an infant, or a bankrupt, that did not discharge the plaintiff from his promise to do the work; therefore, it could not discharge the defendant from his promise to pay for it.

The ruling, in regard to the defendant's availing himself of a set-off, by reason of a supposed balance due William Shipp, growing out of the sale of *castings*, was in strict accordance with the legal rights of the parties. If William Shipp had made payments to the plaintiff, (as distinguished from a set-off), for, and on account of, his work, that would have presented a different question. But the fact that, the plaintiff (as was alleged), had sold castings for William Shipp, and had failed to account therefor, so as to give him a right to sue for an account, was properly excluded from the enquiry involved in the issues joined between the plaintiff and defendant.

PER CURIAM, Judgment affirmed.

A. S. KENT *v.* W. H. EDMONDSTON.

A covenantee is essential to be named in a covenant, except in dedications of land to public uses.

Where a writing under seal, intended to evidence the sale of an article of personal property, was inoperative for the want of form, it was *Held*, that an action of assumpsit would lie on the parol contract, made at the time of

its execution, and that parol evidence of such contract was admissible, independently of the terms contained in such ineffectual writing.

Action of assumpsit, tried before Ellis, J., at the Fall Term, 1856, of Caldwell Superior Court.

The plaintiff declared for the breach of a parol warranty of a jackass. He proved the sale, and the warranty declared on by parol, but upon cross-examination of the witness it appeared that, at the time of the sale, the following instrument of writing was executed, and delivered to the plaintiff, viz:

"State of North Carolina, }
Caldwell County. }

This jack, known by the name of John Bell, which jack is sound as far as I know, and never has been sick since I have owned him; which jack I enwarrant covers well, and a good foal getter; this the 2nd of October, 1852.

W. H. Edmondston. (Seal.")

Whereupon, the defendant objected to the parol evidence to prove the warranty, insisting that the whole contract between the parties, being in writing under seal, it could not be proved in any other way than by the writing. He also contended for the same reason, that the plaintiff's action should have been brought on the sealed instrument, and should have been "covenant," instead of "assumpsit."

The court permitted the plaintiff to give the parol evidence, and the trial proceeded, the above question being, with the consent of the parties, reserved by his Honor, with leave to enter the judgment which his opinion of the law might require. The plaintiff obtained a verdict, and afterwards the court, being of opinion against the defendant upon the question of law reserved, gave judgment in favor of the plaintiff; from which the defendant appealed.

Avery, and *T. R. Caldwell*, for the plaintiff.
Gaither, for the defendant.

Battle, J. A covenant is defined to be "the agreement

or consent of two, or more, by deed in writing, sealed and delivered; whereby, either, or one of the parties, doth promise to the other, that something is done already, or shall be done afterwards. And he that makes the covenant is called the covenantor, and he to whom it is made, the covenantee." Shep. Touch. 160. (20 Law. Lib. 293.)

It seems to be clearly implied by this definition, that the two or more persons, whose agreement or consent is thus manifested by a deed, must be named in it, and we are not aware of any respectable authority to the contrary. A covenantee is as necessary to be named in a deed of covenant, as a grantee is in a deed of grant; and in the latter, it is well known that the grant will not operate where there is no named grantee, except in the case of a dedication of land to the use of the public, where the instrument, or act of the owner, takes effect *ex necessitate rei;* otherwise, the public could not have the use of the land, for the want of a grantee to take it. See *Reeves* v. *Dudley*, 3 Jones' Eq. Rep. at p. 136, and the cases there cited.

An instrument, sealed by one party and not the other, may be a covenant as to the first, and only a written promise by the second. 1 Ch. Pl. 119. "But, (says Mr. Chitty), it appears to be essential that the party claiming the benefit of the covenant, shall be named therein as the covenantee."

If this be law, as we think it is, it sustains the form of the plaintiff's action, and is a complete answer to to the defendant's first objection.

The second ground of defense is equally untenable. An agreement in writing, though not under seal, requires two or more parties to it, and it seems to us, that they must be named in it to make it a complete written contract. If only one of the parties be named, then, as to the other, the contract is by parol, and as one of the essential parts of it, as a contract, must be proved by parol, we see no reason why all the terms should not be proved in the same manner. This is not a case within the statute of frauds, which makes a contract sufficient to bind the party who has signed a written note, or memor-

andum of it. But if it were, we have never understood that the other party need not be named in it. In the case of *Miller* v. *Irvine*, 1 Dev. and Bat. Rep. 103, this Court decided against the opinion of one of the Judges, that the statute of frauds, in the cases coming within its provisions, did not require the consideration of the contract to be set forth in the note or memorandum; but the whole argument in the opinion delivered, goes to show that nothing else essential to the contract could be safely omitted.

PER CURIAM, There is no error. Judgment affirmed.

A. J. BLANTON *v.* HARTWELL WALL.

Where counts for a *deceit* and a *false warranty* are joined in the same declaration, *Held* that the plaintiff might recover on the second count without alleging or proving a scienter.

THIS was an action on the CASE, tried before CALDWELL, J., at the Spring Term, 1857, of Rutherford Superior Court.

The declaration in this case contained two counts, one for a false warranty, and one for a deceit. On the trial of the case, the plaintiff offered evidence tending to show that, in the exchange of horses, the defendant warranted the horse, traded to the plaintiff, to be sound, and a first-rate work nag.

The Court, among other things, charged the jury, that, if they believed there was a warranty, the plaintiff was entitled to recover, if the horse was unsound at the time of the trade; that upon this count the plaintiff was not bound to prove a *scienter* on the part of the defendant. To which charge the defendant excepted, insisting that it was necessary to prove a scienter on both counts.

Verdict for plaintiff. Judgment and appeal by defendant.

Cabaniss and *Logan*, for the plaintiff.
Baxter for the defendant.

PEARSON, J. The count for a deceit alleges a *scienter*, and it is necessary to prove the allegation in order to support the count. But the count for a false warranty does not allege a *scienter*. The allegation is, that there was a warranty of soundness, and that the warranty was false, in this, that the property was unsound. So, the gist of this count is a breach of the warranty, and there is no ground upon which it is necessary either to allege, or affirm, a scienter. *Lassiter* v. *Ward*, 11 Ire. Rep. 443. There is no error.

PER CURIAM. Judgment affirmed.

RICHARD F. MORRIS *v.* EDWARD RIPPY.

Where the real purchaser of property has the title made fraudulently to another, in secret trust for himself, it cannot, at law, be subjected to the purchaser's debts, but must be pursued in a court of Equity.

Witnesses summoned by one suing in *forma pauperis*, are entitled to their costs for attendance. Officers of the court only, are included in the order authorised by the act of Assembly.

ACTION of TROVER, tried before ELLIS, Judge, at the Fall Term, 1856, of Rutherford Superior Court.

The plaintiff, to prove title in himself, offered a duly certified copy, from the register's book, of a bill of sale from one Norton to the plaintiff. He filed an affidavit of the loss of the original; that due search had been made, and that it could not be found. He proved the contents of the bill of sale by the subscribing witness, and that the paper produced was a true copy. The defendant objected to the reception of this evidence, but the court admitted it, and the defendant excepted.

The defendant then proved, by the same witness, that at the time of this transaction, the plaintiff was an infant, in his nurse's arms, and that the slave, in question, was paid for with the means of W. W. Morris, the plaintiff's father, and that the same went into his possession, and remained in it for some years; that the trade was made before they came to the witness; that the consideration was land, not money; and that the deed was made at the same time that the bill of sale was executed. The defendant also proved that W. W. Morris, the father, was indebted beyond his means at the time of this trade between him and Norton, and that he was in fact, at that time, insolvent; that the defendant caused an execution to be levied on the slave in question, under which he was sold at sheriff's sale, and purchased by one Hamrick, as the property of the father; that the plaintiff brought suit against the purchaser Hamrick, and failed to recover.

The defendant insisted that this judgment was a bar to the plaintiff's action; and, at least, was a ground why he should recover but nominal damages, and called on the court so to instruct the jury. The defendant also contended, that the property passed to the father, Morris, before the bill of sale was executed to the son, and was liable to the debts of the former; and asked the court so to charge.

The court declined to give this instruction, but was of opinion that neither of the defenses relied on could avail the defendant. To which he excepted.

The suit was brought in *forma pauperis* by the plaintiff; and in addition to the general judgment on the verdict, he moved, that in the taxation of costs, the clerk be directed to include in the bill the amount of the attendance of the plaintiff's witnesses, which was ordered by the court; for which the defendant also excepted.

Cabaniss, *Baxter* and *Shipp*, for plaintiff.
Bynum and *Gaither*, for defendant.

Battle, J. It is admitted by the defendant's counsel, that

if the title to the slave in question passed by the bill of sale to the plaintiff, he would have no defense at law, although the bill of sale was procured by the plaintiff's father to be so executed, for the purpose of defrauding his creditors. The reason is, as is clearly shown by *Gowing* v. *Rich*, 1 Ire. Rep. 583; *Rhem* v. *Tull*, 13 Ire. Rep. 57, and other cases of that class, that if the deed be held to be void, the legal title of the property will be in the grantor or bargainor, and not in the debtor; so that the creditors cannot, at law, take advantage of the fraud. But in the present case, the counsel contends that the slave did not pass to the plaintiff by the bill of sale, but to his father, who paid the purchase-money, by a sale and delivery, previously to the execution of the bill of sale; and that the title having, as against the vendor, vested in the father by such sale and delivery, his creditors could avoid it by seizing and selling the slave for the payment of their debts. The argument would be good, and the conclusion irresistible, if the premises were correct. A slave may be sold, and upon the payment of the price, the title may pass by delivery, without a bill of sale, unless the parties intend that the contract of sale shall not be complete until a bill of sale is executed, in which case, the title will not pass until that is done; *Caldwell* v. *Smith*, 4 Dev. and Bat. Rep. 64.

From the statement in the bill of exceptions, we are satisfied that the parties intended that the deed for the land, which the plaintiff's father gave for the slave, and the bill of sale for the slave, should be executed at the same time; the subscribing witness testified that it was so done; and we cannot infer, from the statement, that the father took possession of the slave before that time. Such being the case, we are obliged to hold that the legal title passed by the bill of sale, and of course passed to the plaintiff, which makes the principle of the cases to which we have referred directly applicable to the transaction.

We concur also with his Honor in the construction of the 43rd section of the 31st chapter of the Revised Code. The question was referred to, but not decided, in the case of *Car-*

ter v. *Wood*, 11 Ire. Rep. 22, and we are not aware that it has been settled by any previous adjudication in this State. The terms of the act certainly do not expressly embrace any other persons than the officers of the court, and we do not feel ourselves at liberty, without the express authority of the Legislature, to declare that witnesses shall give their time and labor to any person, not even to one suing in *forma pauperis*, without compensation therefor. It is true, that when subpœnaed, they are bound to attend, and give their testimony, without having expenses previously paid or tendered. Rev. Code, chap. 31, sec. 43. But if they can recover for their attendance from the pauper, in the mode provided in the statute, they are at liberty to do so; or they may file their tickets in the clerk's office, and have them collected from the defendant, in the event of the plaintiff's success.

There were some objections taken on the trial, which have not been insisted on in the argument here, and we have not, therefore, thought it necessary to give an opinion upon them, further than to say, as we now do, that they are clearly untenable.

PER CURIAM. There is no error; and the judgment is affirmed.

INDEX

TO THE PRINCIPAL MATTERS

OF

VOL. 4, JONES' LAW.

ABATEMENT OF NUISANCE.

Vide NUISANCE.

ACCORD AND SATISFACTION.

The payment of a lesser sum than the amount claimed, where the amount in question is unascertained, will support the plea of accord and satisfaction. *Mathis* v. *Bryson*, 508.

ACTION.

Vide EXECUTION SALE, 8.

ADMINISTRATION.

1. The law presumes that every administrator settles up the estate in his hands within two years. In an action, therefore, on agreement to pay a debt when a certain estate is settled, if two years have elapsed from the date of the administration, the plaintiff has a *prima facie* right to recover, and the burden of showing that the estate was not settled, is thrown on the defendant. *Ingram* v. *Ingram*, 188.
2. An agreement between persons interested in an estate, the consideration of which is not to bid against each other at the administrator's sale, is against the public policy, and void. *Ibid.*
3. In a contest as to the right of administration, there are strictly no plaintiffs or defendants. All applicants are actors, and some may withdraw and others come in, at any time during the progress of the cause, even after an appeal from the County to the Superior Court. *Atkins* v. *McCormick*, 274.
4. The next of kin of a deceased person, after the widow, have the right amongst them of administration on the estate of a deceased relative, but this right is not vested in one more than another, and the degree of propinquity does not give a legal priority. The court should select from the class, the person best qualified to take care of the estate. *Ibid.*
5. In the appointment of an administrator, a person who cannot write, nor read writing, and has no experience in keeping accounts, or in settling

estates, is *incompetent*, within the meaning of the statute, (Rev. Code, ch. 46, sec. 3.) *Stevenson* v. *Stevenson*, 472.

6. Where a Judge is vested with a discretionary power in making an appointment of administrator, but refuses to exercise such discretion, and appoints one whom he erroneously supposes he is bound, in law, to appoint; *Held* that an appeal would lie to this Court, and the decision should be reversed, and the cause remanded, that he might proceed to exercise a sound discretion in making the appointment. *Ibid.*

Vide DIGNITY OF DEBTS, 1; PLEADING, 4; STAT. OF FRAUDS, 1.

ADVANCEMENT.

Vide STATUTE OF LIMITATIONS, 5.

AGREEMENT—VOID FOR ILLEGAL CONSIDERATION.

Vide ADMINISTRATION, 2.

AMENDMENT.

Every court has the power to amend its own records, so as to make them conformable to the truth. *Parsons* v. *McBride*, 99.

APPEAL.

1. Where an appeal was taken to the Superior Court from a judgment on a motion to quash the return of a mandamus against justices, one set of them, who had been treated as an adversary party in the proceeding, had a right to appeal. *McCoy* v. *Justices of Harnett*, 180.
2. There is no necessity that an appellant should himself sign, or otherwise execute, the appeal bond. *Cohoon* v *Morton*, 256.
3. Where a judgment rendered before a justice of the peace is appealed from, and the parties, by consent, withdraw the appeal, the judgment is restored. *Mathis* v. *Bryson*, 508.
4. Where a Judge refuses to exercise a discretion with which he is invested, from a mistaken opinion that he has no such discretion, it is a proper ground for an appeal. *Stevenson* v. *Stevenson*, 472
5. An appeal upon exceptions to the report of a jury ordered to lay off a road, only embraces the exceptions, and not the merits of the petition. *Anders* v. *Anders*, 243.

Vide CA. SA. BOND; PRACTICE, 5; RECORDARI.

ARBITRAMENT.

1. A provision in a bond to submit to certain arbitrators "the division and settlement of our father's estate," necessarily involves the enquiry, what constitutes that estate. An award, therefore, that a certain slave, claimed by the executor in his own right, should be sold, and the money distributed among all the parties to the submission, was within the scope of the submission, and was obligatory on the executor. *Brown* v. *Brown*, 123.

2. Parol evidence is not only admissible, but necessary to show what matters were acted on by the arbitrators. *Ibid.*

Vide CONTRACT, 8.

ARREST.

What is an arrest, is a matter of law. Whether an arrest was made in a particular case, is a matter of fact depending on intention, and is to be decided by the jury. *Journey* v. *Sharpe*, 165.

ASSENT OF AN ADMINISTRATOR TO DISTRIBUTEE'S POSSESSION.

Where an administrator assented to the possession of a distributee's supposed share of the estate, upon condition that he should thereafter give a refunding bond, which condition is not complied with, the administrator may recover the property from such distributee. *Howell* v. *Johnston*, 502.

Vide STAT. LIM. 8.

ASSETS.

Vide PLEADING, 4.

ATTACHMENT.

1. After a defendant has appeared and pleaded in chief to an attachment, it is too late to object to errors in the form of the attachment. *Symons* v. *Northern*, 241.
2. Money in the hands of a clerk and master in equity, arising from the sale of land for partition, may, after an order for distribution, be attached, and the clerk and master may be garnisheed in respect thereto. *Gaither* v. *Ballew*, 488.

ATTORNEY AT LAW.

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority for an attorney at law to appear in a cause in court, although the agent has no written authority to make the power. *Johnson* v. *Sikes*, 70.

AUTREFOIS CONVICT.

Vide PLEADING, 2.

BAIL.

Vide SCI. FA. TO SUBJECT SHERIFF.

BAIL-BOND.

1. An inconsistent recital in a bail-bond, as to who was the plaintiff, may be rejected as surplusage, where there is enough besides to show who really was the plaintiff. *Turner* v. *White*, 116.
2. So, where the bail-bond was assigned to A, "the plaintiff therein named," and the bond showed that the plaintiff was B; *Held* that B was entitled to the remedy by sci. fa. *Ibid.*

Vide DEED, 6; INDEMNITY.

BAILMENT.

An action on the case will lie in behalf of a bailor, against one who commits

a trespass upon the property bailed; and the plaintiff is entitled to at least nominal damages, though no actual injury is done to the property. *White* v. *Griffin*, 139.

Vide DILIGENCE, 1, 2, 5; STAT. LIM. 8; EXCHANGE OF GOODS.

BEQUEST—CONSTRUCTION OF.

1. The grammatical construction of a clause in a bequest will be disregarded, if it becomes necessary, in order to arrive at the intention of the testator. *Roberts* v. *Watson*, 319.
2. Where one bequeathed a female slave to A, a son, for life, remainder to B, a son of A, and added: "and if the said woman hath increase, to be equally divided among all *his* children," it appearing that, at the time the will was written, A had several children besides B, but B had none, at that time, though he had children afterwards, it was *Held* that the pronoun, "his," referred to the children of A, and not to those of B. *Ibid.*

BOND.

A ca. sa. bond made payable to a firm without the designation of their christian names, is a nullity, and a judgment rendered thereon is void. *Cohoon* v. *Morton*, 256.

Vide APPEAL, 2; COMPOUNDING, &c., 1, 2, 3.

BOOK DEBT.

Vide JURISDICTION.

BOUNDARY.

Where the beginning call in a grant is for a stake, and all the rest of the description is course and distance, the location of the land is impossible, on account of the vagueness of the description. *Mann* v. *Taylor*, 272.

2. Where, in the description of a tract of land, an ascertained or natural object is called for, the same must be reached by one straight line, irrespective of course and distance; and when such ascertained or natural object is of an extensive character—such as another tract of land, a river, or a swamp—this line must be run to the nearest point in such object, likewise disregarding course and distance. *Campbell* v. *Branch*, 313.

BRIDGES.

There is no authority given by the Legislature to County Courts to build bridges over navigable streams, without making draws so as to admit the passage of boats and other craft navigating such streams. *State* v. *Dibble*, 107.

BURGLARY.

1. A smoke-house, opening into the yard of a dwelling-house, and used for its common and ordinary purposes, is, in law, a part of the dwelling, in the breaking and entering of which a burglary may be committed. *State* v. *Whit*, 349.
2. There is no presumption of law arising from any fact, that a felonious breaking into a dwelling-house was committed in the night-time, rather

than the day; and before a defendant can be convicted of burglary, that fact must be proved, either directly or indirectly. *Ibid.*

BURNING WOODS.

1. For one, clearing a new ground, to let fire escape into his wood-land, whereby an extensive and injurious burning of the woods ensues, it is not such a setting fire to his own woods as is contemplated in the Act of Assembly, Revised Code, ch. 16. *Averitt* v. *Murrell*, 322.
2. Where a person working his new ground, within twenty-five yards of woods, puts fire to log-heaps, when the weather is calm, but afterwards, the wind arose and drove the fire with irresistible violence into the woods, he is not guilty of negligence, so as to subject him for damages done by the fire. *Same* v. *Same*, 323.

CART-WAYS.

Under the 10th ch., secs. 33 and 35 of the Rev. Stat., a petitioner who has acquired a right, by order of the court, to have a cart-way over the land of another, and who has afterwards obtained title to the servient tenement, has a right to obstruct and discontinue such cart-way. *Jacocks* v. *Newby*, 266.

CA. SA. BOND.

1. No judgment can be taken upon a ca. sa. bond, if the debtor appears and answers when called at the court to which he is bound, although his surety does not surrender him. *Mears* v. *Speight*, 420.
2. But on an appeal to the Superior Court, the debtor is still bound to appear, when called in the regular course of the Court, and failing to do so, the plaintiff is entitled to a judgment on the appeal bond. *Ibid.*
3. Where a judgment, and a ca. sa. upon it, were taken in the name of a firm as such, without designating the individuals composing it, and a ca. sa. bond was taken payable to the firm so described, it was *Held* that no judgment could be rendered on it. *Cohoon* v. *Morton*, 256.

CERTIORARI.

Besides the ordinary office of supplying the place of an appeal, under peculiar circumstances, the writs of *certiorari* and *recordari* may be used as writs of error and false judgment, respectively; in which cases all that can be discussed is the error alleged to be apparent on the face of the record. *Hartsfield* v. *Jones*, 309.

CHOSE IN ACTION.

Vide RELEASE.

CLERK AND MASTER IN EQUITY.

Vide ATTACHMENT; COLOR OF TITLE.

COLOR OF TITLE.

A deed made by a clerk and master in equity after he goes out of office, upon a sale made by him while in office, is color of title, though not otherwise operative. *Williams* v. *Council*, 206.

COMMON RULE.
Vide EJECTMENT, 1, 2, 3.

COMMON SCHOOLS.
Vide ROADS, 3.

COMPOUNDING AN OFFENSE.
1. Where a bond was given in lieu of, and for an indemnity against, a forged note which is surrendered, and a part of the contract is, that the individual, upon whom the forgery was made, was not to appear against the accused unless he should be summoned, such bond is against the policy of the law and void. *Thompson* v. *Whitman*, 47.
And this, although it is expressly declared by the parties, at the time, that the new security is only given as an indemnity against the forged instrument, and not to compound the offense. *Ibid*
2. Where the obligee represented to the obligor in a bond, that a relation of the latter had committed an indictable offense, and procured the bond in question to be executed, by agreeing not to prosecute for such offense, it is void—whether any such offense had been committed or not. *Garner* v. *Qualls*, 223.
3. A bond, conditioned that the obligee shall not appear as a prosecutor, or as a witness against the defendant in a criminal proceeding, whether it be a case of felony or a misdemeanor, is null and void. *Vanover* v. *Thompson*, 485.

COMPROMISE.
The compromise of a doubtful claim to land, and a conveyance of the disputed land from a daughter and her husband to the father, were properly left to the jury on a question as to the fairness of the conveyance of a deed from the father to the son-in-law. *Black* v. *Caldwell*. 150.
Vide CONTRACT, 8.

CONDEMNATION OF LAND.
Under the charter of the North-Carolina Rail Road Company, only such benefits and advantages as are peculiar to the particular tract in question, and not such as are common to all the lands in the vicinity, are to be taken into the estimate, and the amount deducted from damages to land, taken for the use of the road. *Freedle v. the North-Carolina Rail Road Company*, 89.

CONDITION.
Vide CONTRACT, 9.

CONSIDERATION.
Vide COMPOUNDING, &c., 1, 2, 3; EVIDENCE, 7; CONTRACT, 11; DEED, 3; FRAUD AND CONVEYANCE, 4.

CONSTABLE.
Vide OFFICIAL BOND.

CONSTITUTIONALITY OF A LAW.

A law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law within the meaning of the 10th section of the 1st Article of the Constitution of the United States, and of the 24th section of our Bill of Rights. *State* v. *Bond*, 9.

Hence, a person cannot be convicted under the 90th section of the 34th chapter of the Revised Code, for an offense committed by his agent before the code went into operation, which section made the offense of the agent evidence that it was done by the consent or command of his principal, or employer. *Ibid.*

CONTRACT.

1. A deed conveying one's *active services for five years*, passes no property in the person making it, but gives a *chose in action*, and is not against the policy of the law. *Phillips* v. *Murphy*, 45.
2. One's agreeing to work with his own slave for another, by the day, gives the employer no interest in the slave so as to entitle him to bring an action, or to deprive the owner of a right of action, for taking away the slave while so employed. *Carter* v. *Streator*, 62.
3. A guaranty, at the time of a contract between two or more persons, is binding upon the guarantor, because it is founded upon the consideration existing between the principal parties; but if it be made afterwards, without any new consideration, it is not obligatory, and putting it in writing (if not under seal) will not help it. *Green* v. *Thornton*, 230.
4. But such new consideration need not be expressed in the writing; it may be proved by parol *aliunde*. *Ibid.*
5. Where there is an entire executory contract, and the plaintiff has performed a part of it, and without legal excuse, and against the consent of the defendant, refused to perform the rest, he cannot recover any thing for the part performed. *Niblett* v. *Herring*, 262.
6. A cabinet-maker agreed with a merchant to make an article of furniture and deliver it to the latter in payment of a debt which he owed the merchant. After the article was begun, the mechanic went into co-partnership with another, and the two finished and delivered it. *Held*, that this new firm had no right to make a new charge and recover for the price of the property, but that it was subject to the terms of the original special contract. *Joyner* v. *Pool*, 293.
7. Where a contract is so obscurely worded that the court cannot tell what its meaning is, it is error to leave it to a jury to pass on its meaning, but the court should tell them it could not be recovered on. *Silverthorn* v. *Fowle*, 362.
8. An agreement, the consideration of which is the compromise or arbitration of a right which is doubtful, or supposed by the parties to be doubtful, is valid. *Mayo* v. *Gardner*, 359.
9. B agreed with A, that if the latter would sell the former's land for more

than $1500, he might have all he could get over that sum. A sold it on a credit for $1800, and bonds were taken, payable to B for the whole sum, which B accepted, and gave a bond to make title. *Held* that A was not entitled to his compensation until the money became due and was collected, or might have been. *Joice* v. *Bohanan*, 364.

Vide EXCHANGE OF GOODS; NEGOTIABLE NOTE; PUBLIC AGENT; REASONABLE TIME.

CONTEMPTS.

The Act of 1846, concerning attachments for contempt, (Rev. Code, ch. 34, sec. 117,) by which the court is required to have the particulars of the offense specified on the record, gives no right to an appeal, nor to a writ of certiorari, in such cases. *State* v. *Mott*, 249.

COPARTNERSHIP GOODS.

An execution which comes to the hands of a sheriff, after the assignment of partnership effects by one of the firm, in satisfaction of partnership debts, although tested before such assignment, does not, by relation back to the teste, overreach it; and consequently, the sheriff in such case, may lawfully return *nulla bona*. *Watt* v. *Johnson*, 190.

COSTS.

Costs cannot be given against one *to whose use* a suit is brought. *Lea* v. *Brooks*, 423.

COVENANT.

Where J. L. agreed to make good to the plaintiffs, certain sums, which they had paid as sureties for his son, out of that part of his estate which his said son would be entitled to at his (J. L.'s) death, and covenanted, by deed, to pay such claims as said sureties could *produce on or before the death* of J. L., in a suit brought against the executor of J. L., it *was Held* that it was not necessary to show that the sureties had exhibited their claim to J. L. in his life-time. *Cuthbertson* v. *Long*, 444.

CURTILEGE.

Vide BURGLARY, 1.

CUSTOM AND LICENSE.

A license to enter upon land and to take fish, cannot be implied by proving a usage, or custom, in the country at large, for every person to enter upon such lands and take fish. *Winder* v. *Blake*, 332.

An indefinite number of persons are not capable of taking by grant, nor are they capable of accepting a license, except in the case of inn-keepers, shop-keepers, and the like, who undertake to serve the public. *Ibid.*

No custom can be recognised as having grown up in this country, the effect of which is to supersede the common law. *Ibid.*

DAMAGES.

1. In an enquiry of damages arising from the ponding of water upon land, the plaintiff has a right to have the question submitted to the jury, whether the overflowing complained of was, during the time alleged, injuri-

ous; and any former benefits the land may have received from such overflowing, had nothing to do with the question. *Kimel* v. *Kimel*, 121. Vide 9.

2. Where the loss of an eye was the direct and immediate consequence of exposure to which the plaintiff was subjected by removing the roof of his house, it was *Held* that it might be considered by the jury in aggravation of damages in the action of trespass, q. c. f. *Hatchell* v. *Kimbrough*, 163.
3. A warranty on the sale of a soda fountain, that it was in good condition, is broken, if from an inherent defect in its construction, it was liable to get out of order from time to time, and from that cause failed to answer the purposes for which it was designed, although it was in a condition to make good soda-water on the day of sale. *Pritchard* v. *Fox*, 141.
4. The measure of damages in a case of warranty is the difference in the value of the article, provided it had been in good condition, and its value as it was in its then state. *Ibid.*
5. In an inquest of damages upon a judgment by default, nothing that would have amounted to a plea in bar to the cause of action, can be given in evidence to reduce the damages. *Garrard* v. *Dollar*, 175.
6. The measure of damages against a vendee for refusing to perform his contract for the purchase of land, (the vendor having offered to do all that the contract required of him,) is the purchase-money with interest. *Ibid.*
7. Where occasion was sought, under color of process, to wreak one's vengeance on an individual and his family, by harassing and insulting them, the jury were properly instructed that they might give vindictive damages. *Louder* v. *Hinson*, 369.
8. In trespass or trover, the defendant, for the purpose of lessening the the damages, cannot avail himself of any thing which diminishes the value of the property while in his wrongful possession. *Carter* v. *Streator*, 62.
9. If water be ponded back on the land of another by the erection of a mill-dam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. *Wright* v. *Stowe*, 516.

Vide Evidence, 14.

DATE.

Vide Deed, 2.

DECLARATIONS AND ADMISSIONS.

Vide Evidence, 15, 16.

DECLARATIONS OF A SLAVE.

Vide Evidence, 15.

DEED.

1. A deed in trust was made to one who had no knowledge of its execution at the time, but shortly afterwards, on being informed of the fact, by the draftsman of the deed, he assented to it, agreed to act as a trustee,

and appointed an agent to get possession of the property, who had the deed registered, and proceeded, as agent, to demand and sue for the property; *Held*, that this was a sufficient delivery of the deed, though it had never actually been in the hands of the bargainee. *Green* v. *Kornegay*, 66.

2. The date of a deed which is proved to have been delivered, is *prima facie* evidence that it was executed on that day; but where it is proved that it was signed and sealed, but not delivered on that day, it has no operation, until such time as it is shown to have been delivered, and until that time, any declaration made by the grantor, affecting the title, is evidence. *Newlin* v. *Osborne*, 157.
3. A deed is good in a court of law, notwithstanding any fraud in the consideration of it, or in the false representation of a collateral fact, which induced the party to enter into it. It is only fraud in the *factum*, which will amount to a defense in a court of law. *Gwynn* v. *Hodge*, 168.
4. A deed executed by the husband, for land belonging to the wife, his own name only being inserted in the several parts of the body of the deed, which is subsequently signed and sealed by the wife, and her privy examination taken, does not pass the estate of the wife. *Kerns* v. *Peeler*, 226.
5. A bond given by a slave, with a freeman as surety, is against the policy of the country, and void as to both. *Batten* v. *Faulk*, 233.
6. The entry of the usual formula of an assignment of a bail-bond, with the sheriff's name in the body of it, and the usual form of a seal attached, without the sheriff's name being set down to the same, is not a good assignment, under the act of Assembly. *Hardy* v. *Andrews*, 476.

Vide Fraudulent Conveyance, 1, 2, 3, 4; Registration, 1, 2, 3.

DELIVERY.

Vide Deed, 1, 2.

DESCRIPTION.

Vide Execution Sale, 5.

DEVISAVIT VEL NON.

1. The influence which destroys the validity of a will, is a fraudulent influence, controlling the mind of the testator, so as to induce him to make a will which he would not otherwise have made. *Marshall* v. *Flinn*, 159.
2. A provision in a will that a certain female slave "will be set free, if she behaves herself as a good character should do—to be under the care of my daughter J. and her daughters," conveys no interest, either legal or equitable, to the daughters of J. *Malloy* v. *McNair*, 297.
3. Where a script was attested by three witnesses, one of whom was incompetent on account of a pecuniary legacy, and afterwards a legacy was transferred from one legatee to another, by erasing the bequest in one part of the instrument and interlining it in another, as to which acts one of the competent witnesses to the first execution, and the one taking the legacy, again attested it, the alteration in no wise affecting his lega-

cy; *Held*, that the script, in its altered condition, was duly attested. *Ibid.*

4. Where a decedent had two drawers, in one of which he kept his notes, deeds, and other papers of value, carefully arranged, together with his money and other valuable effects, and in the other, he kept some papers of little value, carelessly deposited, with some effects of very small value, it was *Held*, that a holograph script, found in the latter place, could not be proved as a will, under the statute, (1 Rev. Stat. ch. 122, sec. 1;) for that the articles found with the script, could, in no just sense, be called "*the* valuable papers or effects" of the decedent. *Little* v. *Lockman*, 494.

Vide Evidence, 6.

DIGNITY OF DEBTS.

1. The claim which a purchaser at sheriff's sale has against the defendant in an execution, on account of a defective title, is but a simple contract debt, and an executor who pays such a claim in preference to a judgment creditor, is guilty of a *devastavit*. *Laws* v. *Thompson*, 104.
2. A purchaser at sheriff's sale, who gets a defective title, has no right to take the place of the creditor by substitution, and thus bring to his aid the dignity of such creditor's debt. *Ibid.*
3. Equity never interferes against creditors. *Ibid.*

DILIGENCE, NEGLIGENCE, &c.

1. To work a hired slave at the business of blasting rock, in the night-time, when fragments of falling rocks could not be seen, would not be taking ordinarily reasonable care of such property. *Couch* v. *Jones*, 402.
2. But if a hired slave of his own accord, against the directions of the hirer, without his knowledge or consent, in the twilight, when his presence was not easily discovered, took the place of one of the regular hands at that business, and was killed by a falling rock, the bailee would not be liable for the loss. *Ibid.*
3. The killing of a cow, or other animal, on a railroad, by the train's running over it, is not, of itself, proof of negligence. *Scott* v. *Wilmington and Raleigh Rail Road Company*, 432.

EJECTMENT.

1. The general principle in an action of ejectment, is, that the plaintiff must prove the defendant in possession of the premises sued for, notwithstanding the confession of "lease, entry and ouster" in the "common rule." *Atwell* v. *McLure*, 371.
2. The principle of the rule is to prevent surprise on the party who makes himself a defendant. *Ibid.*
3. But where a person, served with a copy of the declaration after leaving the premises, entered into the common rule, and contested the matter upon the validity of the title deeds, there being no question as to the identity of the land, he shall not be heard to say he was not in possession when the declaration was served on him. *Ibid.*

4. The beginning of an action of ejectment is the serving of the declaration. *Ibid.*

5. Where a deed of bargain and sale, reciting its object to be to secure the premises to the sole and separate use of the bargainor's daughter, and a consideration of one dollar moving from the bargainee, conveyed the same to the said bargainee and his heirs, in trust for the sole, separate and exclusive use of the said daughter and her heirs, on the death of the daughter, leaving children, her heirs-at-law: *Held*, that the said heirs-at-law could not maintain an action of ejectment; but that the legal estate still remained in the trustee. *Bruce* v. *Faucett*, 391.

ENDORSEMENT.

The owner of a bond on an individual, with a surety to it, endorsed it without recourse upon the endorser, as the consideration for property bought of the endorsee, having first cut the surety's name from the bond; it was *Held*, that the endorsement amounted to a valid consideration in the contract of purchase. *Gwynn* v. *Hodge*, 168.

ENROLLMENT.

When the report of commissioners, making a partition and appropriation, is confirmed by the court, and filed in the papers of the case, it is *enrolled*, so as to meet the requisition of the Act of Assembly. *Archibald* v. *Davis*, 133.

EQUITY.

Equity never interferes between creditors. *Laws* v. *Thompson*, 104.

ERASURE.

Vide Evidence, 6.

ESTOPPEL.

Vide Party to a suit.

EVIDENCE.

1. A law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender, is an *ex post facto* law within the prohibition of the constitution. *State* v. *Bond*, 9.

2. A party who becomes bound by acquiescence in a defective judicial proceeding, may give such proceeding in evidence in his favor. *Archibald* v. *Davis*, 133.

3. A stockholder in a bank is not a competent witness to establish a debt due to the bank. *Stevenson* v. *Simmons*, 12.

4. One who believes in the existence of a Supreme Being, who will punish in this world for every sin committed, though he does not believe that punishment will be inflicted in the world to come, is a competent witness. *Shaw* v. *Moore*, 25.

5. The fact of the registration of a deed, without its having been proven, will not entitle it to be read in evidence. *Williams* v. *Griffin*, 31.

6. In ascertaining whether an instrument was intended by the maker to

operate as a *bond* or as a *will*, words which may not change the legal effect of the instrument, and may, therefore, be immaterial in construing it, supposing its character to have been established, may be quite material in ascertaining its character; and though their alteration or erasure may be of no importance in the former point of view, yet they are quite material in the latter. *Smith* v. *Eason*, 34.

7. Where, from the loose manner in which the parties have dealt with each other, it is not possible to show the precise quantity of commodities delivered, or their quality, or value, it is proper to allow jurors to act on evidence which will enable them to approximate the truth of these facts. *Harrison* v. *Bridges*, 77.

8. One who has a *direct*, *certain*, *legal* interest in the event of a suit, is not a competent witness on the side of his own interest. *Blum* v. *Stafford*, 94.

9. The interest which will disqualify a witness, is any interest that can be asserted in a court of justice, whether a common law court or a court of equity. *Ibid.*

10. A copy of a grant taken from a book in the office of the Secretary of State, purporting to be issued in 1716, by Charles Eden and others, who were the Governor and Council, although but lately registered, is admissible as evidence of title. *Archibald* v. *Davis*, 133.

11. A plot by a surveyor, representing various tracts and lots of land of the ancestor, corresponding in number with the number of heirs set out in the petition, filed with the papers of the case, and registered with them, was properly taken as the plot referred to in the report of the commissioners, and admitted as evidence to explain such report. *Ibid.*

12. Where the subscribing witness to a bond, having purchased the interest therein without endorsement, sold the same without endorsement, on a credit, with the avowed purpose of making himself competent to testify, and states that it was, at the time of the trade, and still is, his purpose, not to make his vendee pay for the bond, unless he can recover it, but says there was not any understanding to that effect between them in the trade; *Held* that he is legally admissible. *Purvis* v. *Albritton*, 171.

13. Where the fact is assumed that the property of the plaintiff came to the defendant's possession, and was used by him, and no question is raised as to the nature and terms of the contract of purchase, a letter ordering the property to be sent, was not necessary evidence, and it was not error to proceed without it. *Hollingsworth* v. *Smith*, 270.

14. The purchase of a particular estate in land by a reversioner, is no evidence tending to show that a claim for damages, which the purchaser had, on account of waste theretofore committed, was settled in that purchase. *Dupree* v. *Dupree*, 387.

15. It is no objection to the declarations of a slave, as to the state of its health, that they furnish additional evidence of their truthfulness. *Wallace* v. *McIntosh*, 6.

16. Therefore, where a female slave declared that she was affected with a *prolapsus uteri*, and offered to submit to an examination of her person, in

verification of her statement, the latter part of the discourse forms no good ground of exception to the evidence. *Ibid.*

17. A witness is not competent to testify to what a deceased witness swore on a former trial, unless he says he is able to state the substance of all that was deposed to by the deceased witness. *Wright* v. *Stowe*, 516.

An exception to the competency of the witness, need not set out the testimony which the witness was called to give. *Ibid.*

Vide ARBITRAMENT, 2; BURGLARY, 2; DEVISAVIT VEL NON, 2, 3; PAROL CONTRACT, 1; CONSTITUTIONALITY OF A LAW.

EXCHANGE OF GOODS.

Where there has been a temporary exchange of articles, there is no principle that requires that the one shall be returned to the former owner before the other can be recovered. *Hoell* v. *Paul*, 75.

EXECUTOR.

1. No action can be maintained against an executor, as executor, for money had and received by him, after the death of the testator. *Hailey* v. *Wheeler*, 159.

2. For the executor of an estate to permit a slave bequeathed to a daughter to remain with her, at the late mansion of the deceased, for ten years, without himself ever assuming any control over the slave, is certainly some evidence of an assent. *Propst* v. *Roseman*, 130.

EXECUTION SALE.

1. One who contracts for land, and stipulates that the title shall be made to a trustee for the benefit of his wife when the purchase-money is paid, and who enters and holds as tenant to the vendor, has no legal right that he can convey, or which can be sold under execution; and the only effect his deed, or that of the sheriff, could have, would be to put the purchaser

EXPERTS.

Where some of the terms in which a contract is expressed, are words of science or art, which require the evidence of experts to explain them, the jury, of necessity, must pass upon the meaning of those words; but being ascertained by them, the duty of the court is, still to give a construction to the contract. *Silverthorn* v. *Fowle*, 362.

Where there are not such terms, the construction is entirely with the court. *Ibid.*

EX POST FACTO.

A law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender, is an *ex post facto* law within the meaning of the constitution. *State* v. *Bond*, 9.

EXPUNGING A RECORD.

It is error in a court to rescind an entry made on a previous day of the same term, which truly states a fact that did occur. *Underwood* v. *McLaurin*, 17.

into possession, so as to make him capable of receiving a release. *Williams* v. *Council*, 206.

2. Where a husband buys land, which is paid for with his money, but directs that the title shall be made to a third person, in trust for the wife, he has no such trust-estate as can be sold under execution. *Ibid.*
3. Where a trust is divided by giving a particular estate to A, with the remainder or reversion to B, the trust-estate of A cannot be sold by execution under the Act of 1812. *Ibid.*
4. A purchaser at a sheriff's sale under a *venditioni exponas*, is not bound to show any thing in relation to the disposition of property, which had been levied on under the previous execution. *Chasteen* v. *Phillips*, 459.
5. A levy, endorsed on a justice's execution, as being made "on three tracts of land, containing three hundred acres, on Caney Fork," is not sufficiently definite to comply with the requisites of the Act of Assembly. *Ibid.*
6. Facts, merely collateral to the description contained in a levy endorsed on a justice's execution, cannot be adduced to extend, or help out, an insufficient description of the land levied on. *Ibid.*
7. Only such estate as a debtor has, passes by virtue of an execution sale. *Homesley* v. *Hogue*, 481.
8. The owner of an ultimate estate in chattels, cannot maintain an action against a sheriff, who has an execution against the owner of a particular interest, for selling it, although he professes to sell the entire property in such chattels. *Ibid.*
9. A sale of land under, and by virtue of, a judgment and execution, transfers, at law, all the estate, rights and interest, of the defendant, in the execution; even the legal estate which he holds as trustee. *Giles* v. *Palmer*, 386.
10. One who purchased a trust-estate under execution, previously to the act of 1812, only got the possession of the defendant in the execution, and a right in a court of equity, to be substitued to the rights of the creditor whose debt he paid. *Taylor* v. *Gooch*, 436.
11. A purchaser at an execution sale, is not bound to see that the sheriff sold on the proper day in the week. *Reid* v. *Largent*, 454.

FERRIES.

1. The right of a ferryman to his toll, is by the common law; and every subtraction from his profits, by carrying his *customers* over the same stream, whether for pay or not, is an injury for which he may recover damages. *Taylor* v. *Wilmington and Manchester Rail Road Company*, 277.
2. The customers of a ferry are those wishing to go along the highway, of which the ferry constitutes a part, and whom he would be bound to tranport on being called on by them, and not such as wish to travel from one of the ferry landings to a point out of the highway. *Ibid.*
3. The Act of Assembly, Rev. Code, ch. 101, sec. 30, recognises the common law remedy, and further gives a penalty of two dollars for every

transportation of passengers, &c., within ten miles of an established ferry, *if done for pay.* *Ibid.*

4. The object of the private Acts of Assembly in favor of William Dry, passed in 1764, and of Benjamin Smith, in 1784, was to effect a communication between the towns of Wilmington and Brunswick, by means of two ferries, and a road over Eagle's island, between them; and the customers to these ferries, would be only those designing to travel along this highway, or a part of it, and would not include one designing to pass from one of the ferry landings to a point on the island not in the highway. *Ibid.*

FORCIBLE TRESPASS.

1. To make a trespass for an entry on land indictable, it must be committed *manu forti*, in a manner which amounts to a breach of the peace; or (according to some authorities) which would necessarily lead to a breach of the peace, if the person in possession were not overawed by a display of force, and thus be induced to forbear from resistance. *State* v. *Ross*, 315.
2. Where, therefore, one, having a right to enter on land in the possession of a tenant at sufferance, went with four others, and commenced building on the land outside of the tenant's enclosure, without invading his dwelling, or molesting his enclosure, without any display of arms, or actual breach of the peace, it was *Held* not to be indictable. *Ibid.*
3. Whether at the common law, one who has the right of entry may not use force, if necessary, to assert his right, is an unsettled question. *Ibid.*

FRAUDULENT CONVEYANCES.

1. A voluntary conveyance of personal property passes the legal title as to *subsequent purchasers*, though void as to creditors. *Green* v. *Kornegay*, 66.
2. A creditor can only take advantage of a voluntary and fraudulent conveyance by reducing his claim to a judgment, and seizing the property under an execution. *Ibid.*
3. A party seeking to avoid a conveyance as voluntary, has no ground to complain of the principle thus laid down: "Where a parent greatly embarrassed, which embarrassment ends in insolvency, makes a conveyance to a child, it devolves upon the child to show that he gave a fair price for the property, actually paid, either in money or money's worth." *Black* v. *Caldwell*, 150.
4. Where, in a question whether a certain deed was fraudulent and void as to creditors, facts were adduced and relied on by both parties, and many of the usual badges of fraud were proved, and where among other facts, it appeared that a small balance, out of a large consideration recited in the deed, was unpaid, it was error in the court to make the question of fraud turn upon the payment, or non-payment, of the whole consideration expressed in the deed. *Felton* v. *White*, 301.

FREE NEGROES.

Vide CONTRACT, 1.

GRAND JURY.
Vide INDICTMENT, 2.

GUARANTY.
1. The notice given to a guarantor that he is looked to for the debt guaranteed, must be positive and unconditional. *Spencer* v. *Carter*, 287.
2. Where it is clear that early notice to a guarantor, of the failure to pay of the person whose debt he has guaranteed, could have been of no benefit to him, such early notice is not required, and the want of diligence, in this respect, does not impair the guarantor's obligation. *The Salem Manufacturing Company* v. *Brower*, 429.

Vide STAT. OF FRAUDS.

GUARDIAN AND WARD.
Vide SALE OF AN INFANT'S LAND.

HARBORING SLAVES.
To constitute the offence of harboring a runaway slave, it is not necessary that, at the time of first receiving the slave, the defendant conceived the purpose of fraudulently harboring, if his acts afterwards plainly evinced such a purpose. *State* v. *Burk*, 7.

HIGHWAYS.
Vide FERRIES; CART-WAYS.

HOLOGRAPH WILL.
Vide DEVISAVIT VEL NON, 4.

HOMICIDE.
1. If a man deliberately kill another to prevent a mere trespass on his property, (whether that trespass could or could not be otherwise prevented,) he is guilty of murder. *State* v. *McDonald*, 19.
2. Though a person may enter into a fight willingly, yet if in its progress, *he be sorely pressed*, that is, *put to the wall*, so that he must be killed or suffer great bodily harm unless he kill his adversary, and under such circumstances he does kill, it is but *excusable homicide*. *State* v. *Ingold*, 216.
3. Where a Judge, in charging the jury in a case of homicide, presents two views of the evidence, in one of which his instruction is erroneous, though the other was right, if it be left uncertain whether or not the verdict of the jury was predicted on the erroneous instruction, the defendant is entitled to a *venire de novo*. *Ibid.*
4. Where a female slave was in the act of resisting the rightful authority of her master, and another slave, her husband, approached with the intention of violently aiding the resisting slave, heedless of the consequences, and did give such aid as made it necessary for the master to turn his force upon him, by which he was exposed to a fatal blow from the principal, such interfering slave, as well as the principal, is guilty of murder. *State* v. *David*, 353.
5. There is no analogy to be drawn between cases where a free person is on trial for homicide, and a slave for slaying his master. *Ibid.*

HUSBAND AND WIFE.

Vide DEED, 4; EXECUTION SALE.

INDICTMENT.

1. The allegation of a bill of indictment, charing A and *four* others with an assault on B, is not proved by the production of a record, which sets forth a bill of indictment, charging A and *five* others with an assault on B. *State* v. *Harvell*, 55.
2. Where a record shows that a grand jury was drawn and empannelled, sworn and charged to enquire for the State, of and concerning all offenses &c., and by such grand jury, "it was presented in manner and form following, that is to say," setting out the bill of indictment; the record is sufficient without copying the entry of "a true bill," usually found on the backs of indictments. *State* v. *Guilford*, 83.
3. In an indictment for cheating by false tokens, in obtaining an article of property from a person by means of a counterfeit piece of coin, to wit, a counterfeit quarter of a dollar, it is not material to aver to what currency the coin, intended to be counterfeited, belonged. *State* v. *Boon*, 463.
4. Nor is it necessary to aver that the spurious coin used, was made like the one alleged to be imitated; the word "counterfeit" being a sufficient allegation of that fact. *Ibid.*
5. Where the indictment charged that the article was obtained by means of a false coin, it was not necessary to aver that this was done by *passing* it. *Ibid.*
6. Nor, in such an indictment, is it necessary to allege the value of the thing obtained, or to aver that it was of any value, if it be a thing recognised as *property*. *Ibid.*
7. Nor is it necessary to aver that the thing obtained was the property of the person from whom it was alleged to have been obtained. *Ibid.*
8. If the last objection had been otherwise good, it would have been obviated by the statute; Rev. Code, ch. 35, sec. 14. *Ibid.*

Vide FORCIBLE TRESPASS, 1, 2, 3; REPEAL OF A PENAL STATUTE; SELLING LIQUOR TO A SLAVE.

INDEMNITY.

A sheriff who has failed to assign a bail-bond, cannot recover against the obligors to the same, until he has paid the money to the plaintiff in the judgment, or at least, until there is a judgment against him for it. *Pool* v. *Hunter*, 144.

INFANT.

1. Timber furnished to an infant to enable him to build a dwelling on his land, is not a *necessary*. *Freeman* v. *Bridger*, 1.
2. An infant, who has a guardian, cannot contract for necessaries. *Ibid.*
3. The proviso of a new action, as a saving to an infant, against the statute of limitations, is a *personal protection*, and the grantee or releasee of an infant, has no right to set up the same. *Williams* v. *Council*, 206.

Vide SALE OF AN INFANT'S LAND.

INN-KEEPER.

1. An inn-keeper, by the *custom of the land*, is liable as an insurer for the goods and animals which his *guest* has with him for the purposes of the journey. *Neal* v. *Wilcox*, 146.
2. But if his customer is only a boarder, or the goods and animals are entrusted to the landlord upon a special contract, or if they are not placed in the *inn* or its appurtenances to be kept, he is only liable for negligence, as any other bailee. *Ibid.*
3. Hence, an inn-keeper is not liable, without proof of negligence, for the loss of a mule, put by a "drover" into a lot belonging to the landlord, separate from the inn, to be kept under a special agreement. *Ibid.*

INTENTION.

Vide HARBORING A SLAVE.

INTEREST.

Where an agent has money in his hands, and when demanded, denies his obligation to pay, there is no principle upon which he can be charged with interest, further back than the time of such demand. *Hyman* v. *Gray*, 155.

JOINT-OWNERSHIP.

1. Where a joint-owner of property, authorised to sell, warrants the soundness of the property, which turns out to be defective, and the seller pays for the defect without suit, the other joint-owner is liable to contribute to the loss in proportion to his interest. *Davis* v. *Burnett*, 71.
2. If one joint-owner of a crop sells to the other his share of it to pay a debt, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner's removing the property, though forbidden by the other. *Warbritton* v. *Savage*, 382.

JOINT-TRESPASSER.

A and B were tenants in common of a tract of land. A, with the sanction and assent of B, employed a surveyor to run the boundaries of their land, and in doing so, A., accompanied by the surveying party, committed a trespass on an adjoining tract; *Held* that B was equally liable for such trespass. *Elliott* v. *McKay*, 59.

JUDGE AND JURY—THEIR RELATIVE DUTIES.

1. A mere omission of the Judge to charge the jury on a particular point, where no specific instructions on it have been asked, is not error. *Ward* v. *Herrin*, 23.
2. A petitioner under the 4th sec. of 58th ch. of the Rev. Statutes, (for the relief of insolvent debtors) is entitled to insist that suggestions of fraud, made by a creditor, shall be verified by the oath of the creditor and tried by a jury; and it is error in a Judge to decide upon such suggestions, without submitting them in an issue to a jury. *Purvis* v. *Robinson*, 96.

3. It was *Held* not to be error in a Judge to leave it for the jury to decide whether the cutting down of 182 timber trees entitled the party to more than nominal damages, and if so, how much. *Archibald* v. *Davis*, 133.
4. Where special instructions are prayed for in the trial of a cause, it is the duty of the court to respond, either by adopting the prayer, or by refusing to do so. But he is not required to charge in the language in which the application is made; if he substantially conveys the idea to the jury, it is sufficient. *Marshall* v. *Flinn*, 199.
5. Where the court erred in ruling out testimony, and a proposition is made by the counsel on the other side to waive the objection and admit the evidence, which is declined, the error is cured by this waiver and refusal. *Ibid.*
6. If a Judge omits to state the testimony as fully as counsel wish, he ought to be requested, before the jury retire, to make his statement of the evidence more full; but it is not a ground for excepting to the charge where no request of that kind has been made. *Boykin* v. *Perry*, 325.
7. It is error to leave a jury to draw inferences without evidence. *Wakefield* v. *Smithwick*, 327.
8. "Due return" of process, means a proper return made in proper time. What is a proper return in form and substance, is a question of law, to be decided by the court; but whether a return was made in proper time, is a question of fact, to be decided by a jury. *Waugh* v. *Brittain*, 470.
9. It is error in a Judge to leave a question to the decision of the jury without some evidence bearing on such question. *Dula* v. *Cowles*, 519.
10. If a Judge charges substantially according to law, there is no ground for exception. *State* v. *Shaw*, 440.
11. One who prosecutes another, cannot be protected where the facts charged do not amount to an offense in law. *Smith* v. *Deaver*, 513.
12. Where a Judge fails to exercise his discretion in appointing an officer, from a mistaken opinion that he has no discretion, it is a ground of appeal; although if he had exercised his discretion, his judgment would not have been subject to an appeal. *Stevenson* v. *Stevenson*, 472.
13. In such a case, the decision will be reversed and the cause removed to the court below, that such discretion may be exercised. *Ibid.*

Vide Damages, 2, 7; Fraudulent conveyance, 3; Homicide, 3; Practice, 1, 2; Slander, 2.

JURISDICTION.

1. Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars, the plaintiff can omit, or give credit for, any items he may choose so as to bring the case within the jurisdiction of a single magistrate. *Waldo* v. *Jolly*, 173.
2. Where there is but one item of dealing, which goes beyond sixty dollars, this cannot be done. *Ibid.*
3. The plaintiff cannot, however, after thus obtaining jurisdiction, prove the account under the book-debt law; for under that, he has to swear that the account sued on contains a full statement of all their dealings. *Ibid.*

LARCENY.

1. Under the 34th ch., sec. 36, and 107 ch., secs. 31, 32 and 34, of the Revised Code, the Superior Courts have not original jurisdiction of the offence of grand larceny committed by a slave. *State* v. *Harriet*. 264.
2. Although being found in the possession of stolen goods, after a certain length of time, does not create a presumption of the possessor's guilt, yet, it is a fact that may be considered by the jury, with the other facts of the case. *State* v. *Shaw*, 440.
3. Acts which would constitute *aiding and abetting* in grand larceny, will justify a conviction for petit larceny, when that is charged. *Ibid.*

LEGAL TITLE.

Vide EJECTMENT, 5.

LEX LOCI.

Vide PRESUMPTIONS.

LEVY.

Vide EXECUTION SALE, 4.

LIEN OF A FI. FA.

Vide COPARTNERSHIP GOODS.

LIMITATION OF SLAVES.

A bequest of a slave for the life of the legatee, without any limitation over, passes only a life-estate to such legatee. The assent of the executor extends no further than to the life-interest, and the reversion is in the executor, which he may recover after the falling in of that interest. *McKinley* v. *Scott*, 197.

LUNATIC.

An action accruing to a lunatic can only be brought in his name. *Green* v. *Kornegay*, 66.

MANDAMUS.

1. A *mandamus* to the justices of a county to compel them to do a thing in their public capacity, requires "a return" by them as a body. *McCoy* v. *The Justices of Harnett county*, 180.
2. Where an *alternative mandamus* was directed to the justices of a county, and one set of them, as individuals, made a return of one import, and another set of them made a return of a different import, no convention having taken place to get the voice of the majority, it was *Held* that the return was a nullity, and that all the proceedings in the cause, predicated on it, were erroneous. *Ibid.*

MASTER AND SERVANT.

A master is not liable for the wilful trespass of his servant. *Wesson* v. *Rail Road Company*, 379.

MILLS.

Vide DAMAGES, 1, 9.

NEGLIGENCE.

Vide Burning woods; Diligence, &c., 1, 2, 3.

NEGOTIABLE NOTE.

A note made payable to "T. D., cashier," negotiable and payable at a particular bank, which note is made for the purpose of being discounted at that bank, but is rejected and not discounted, is afterwards sold and delivered to a third person, by the principal therein, without the assent of the sureties; *Held* that T. D. could not recover against the surety on such note, for the benefit of such third person. *Dewey* v. *Cochran*, 184.

NEW PROMISE.

Vide Statute of limitations, 2, 9, 10.

NEW TRIAL.

Whether a verdict is against the weight of the evidence, is a matter solely to be determined by the Judge trying the cause, and the question of a new trial on that ground, must be conclusively decided by him. *Boykin* v. *Perry*, 325.

NOTES, BILLS, &c.

Vide Guaranty, 1, 2.

NOTICE.

Vide Guaranty, 1, 2.

NUISANCE.

The Legislature having by various Acts declared the Neuse river, between certain points, a navigable stream, it is a nuisance to build a bridge across the same between these points, so as to prevent the passage of boats, and such nuisance may be abated by any one. *State* v. *Dibble*, 107.

OFFICIAL BOND.

Under the 9th sec. of 79th ch. of Rev. Code, a bond given by one at Oct. Term, 1851, conditioned for his faithful discharge of the duties of an office for one year from the date, can be recovered on, notwithstanding the office expired at the January Term, 1852, and the breach was subsequent to that date. *Hoell* v. *Cobb*, 258.

OVERFLOW OF LAND.

If water be ponded back on the land of another by the erection of a mill-dam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. *Wright* v. *Stowe*, 516.

PAROL CONTRACT.

1. Where the terms of the hiring of a slave are proclaimed previously to the public exposure of the slave for hire, one of which was, that he was not to be removed beyond the limits of the county, a bond subsequently given for the price, and containing some other stipulations as to the treatment and management of the slave, does not supersede the parol contract as to removing the slave. *Daughtry* v. *Boothe*, 87.

2. A party made a bill of sale of personal chattels in the ordinary form, and there was a parol agreement made at the same time, that the articles should be delivered on a given day, which was not done; *Held* that the title to the property passed from the date of the conveyance, notwithstanding the parol agreement. *Gwynn* v. *Hodge*, 168.
3. Parol evidence may be admitted to prove a contract where there was an ineffectual attempt to reduce it to writing. *Kent* v. *Edmondston*, 529.

PARTY TO A SUIT.

A record of proceedings of a court ordering partition of a tract of land, and a long acquiescence and actual occupation by the heirs according to the proceeding, is obligatory on them, and one thus acquiescing, who was mentioned as one of the heirs, in the body of the petition, but was not made a party, plaintiff or defendant, is bound by the proceeding, and, therefore, may offer it in evidence in support of his title. *Archibald* v. *Davis*, 133.

PAWN.

1. Property delivered as a pledge to secure a debt, and re-delivered by the pawnee to the pawnor, is liable to be seized and sold under execution against the pawnor. *Barrett* v. *Cole*, 40.
2. Property deliversd as a pledge to secure a debt, and re-delivered by the pawnee to the pawnor, may be *sold* by the latter, and a good title passes. *Smith* v. *Sasser*, 43.
3. There can be no parol agreement that a slave shall stand as a pledge. *Propst* v. *Roseman*, 130.

PAYMENT.

Where a third person pays the sum called for in a note, and takes it into his possession, it is a question of fact to be decided by a jury whether he intended to pay it off for the accommodation of the maker, or to purchase it. *Runyon* v. *Clark*, 52.

Vide Accord and satisfaction; Contract, 9; Presumption of payment.

PERFORMANCE.

Vide Contract, 5.

PLEADING.

1. Where the plaintiff declared against the defendant, as executor, for money had and received by him as executor, the defendant may either demur for the badness of the count, or he may move for a nonsuit, or claim a verdict on the trial of the general issue, because the allegation has not been proved; and the principle is not varied by the fact, that the allegation, in its nature, is not susceptible of being proved. *Hailey* v. *Wheeler*, 159.
2. Where a party has been tried in the county court upon an indictment for an affray, he cannot be again tried for the same act in the Superior Court upon a bill for assault and battery. *State* v. *Stanly*, 290.
3. Where a warrant has been brought against an administrator for the debt of his intestate, and the justice, before whom it is returned, renders a

judgment against him individually, it is error, for which a *recordari*, in the nature of a writ of error, is a proper remedy. *Hare* v. *Parham*, 412.

4. The general rule is, in such a case, simply to reverse the false judgment; but where it appears that the plaintiff was entitled to a judgment against the assets in the hands of the adm'r., the Court will order the case back to the Superior Court, that the question of assets may be tried. *Ibid.*

Vide ATTACHMENT, 1; DAMAGES, 5; MANDAMUS, 1, 2; PROFERT, 1, 2.

POSSESSION.

The acts of going yearly, for a few weeks at a time, to get rails and other timber off of land, though only valuable for timber, do not amount to such an exercise of ownership as will ripen a defective title, or give an action of trespass *quare clausum fregit*. *Bartlett* v. *Simmons*, 295.

Vide STAT. LIM., 6.

POWER OF ATTORNEY.

A power of attorney signed by the agent of the beneficial owner of a note, is good, though such agent did not derive his authority in writing. *Johnson* v. *Sikes*, 70.

PRACTICE.

1. Where evidence of facts not pertinent to the issue, was admitted, upon the assurance of the prosecuting officer, that he would introduce other facts and circumstances to connect the prisoner with the facts deposed to, and no such connecting facts were produced, it was error in the Court to leave such evidence to be considered by the jury. *State* v. *Freeman*, 5.
2. Where the agent of one indicted for trading with a slave, swore that he had general instruction from his principal not to traffic with slaves without a written permit, it was *Held*, that although this, if true, threw the *onus* of further proof of defendant's guilt upon the State, yet it was not error in the Judge to leave the enquiries to the jury, whether these instructions had been abrogated, and whether the defendant had specially approved of the act. *State* v. *Privett*, 100.
3. Where a case has been transmitted to this Court irregularly and improperly, and decided under the impression that it was here by the consent of parties, on its appearing to the Court, at the same term, that it was not so brought up by consent, the Court will order the judgment to be vacated and the cause stricken from the docket. *Mann* v. *Taylor*, 127.
4. The heirs-at-law of a deceased defendant cannot, against the will of the plaintiff's lessor, make themselves a party to an action of ejectment, so as to prevent the suit from abating. *Watkins* v. *Easley*, 286.
5. Where an action of assumpsit was brought upon an unliquidated account, a judgment given against the defendant, and an appeal taken to the county court, upon a default in that court, it was error to give judgment final for the sum recovered below, without an enquiry of damages. *Hartsfield* v. *Jones*, 309.
6. The proper rule of practice is, for the party having the right to conclude,

to open the argument; the opposite party then replies; and the former again replies in the way of conclusion. *State* v. *David*, 353.

7. The rule of evidence, forbidding the counsel in a cause to ask a witness on his side, leading questions, may, under certain peculiar circumstances, be relaxed, or altogether abandoned, at the discretion of the presiding Judge. The exercise of this discretion cannot, ordinarily, be appealed from, but when its effect is to deprive the party of competent testimony, an appeal is allowable. *Gunter* v. *Watson*, 455.
8. One of the circumstances, authorizing such departure, is where one witness is called to contradict another, in which case, the interrogatory may be permitted to embrace the language proposed to be contradicted. *Ibid.*
9. Where a sum has been erroneously found by the jury against the defendant, it will not cure the error for the plaintiff to *offer* to remit the amount thus erroneously allowed, without actually doing so. *Dula* v. *Cowles*, 519.

Vide EJECTMENT, 1, 2, 3; PROFERT OF LETTERS OF ADMINISTRATION.

PRESUMPTION.

Vide BURGLARY, 2.

PRESUMPTION OF PAYMENT.

1. Where a bond has been standing for ten years, and the presumption of payment from the lapse of time is relied on, contradictory and false statements made by the defendant as to the time, place and manner of discharging the bond, are not sufficient to repel the presumption. *Lowe* v. *Sowell*, 235.
2. The presumption of payment arising from the lapse of time, applicable to a bond executed in another State, is that allowed by our law, and not that which prevailed in the State where the bond was executed. *Haws* v. *Cragie*, 394.

PROBATE.

Vide REGISTRATION, 1, 2, 3.

PROFERT OF LETTERS OF ADMINISTRATION.

1. Where one sues as administrator, he is not bound to produce his letters of administration on the trial. *Hyman* v. *Gray*, 155.
2. Where a plaintiff *declares as administrator*, profert of the letters of administration is made in the declaration, and no proof in respect to plaintiff's representative character, is required on the trial. *Daws* v. *Taylor*, 499.

PROOF.

Vide INDICTMENT, 1.

PUBLIC AGENT.

Where an order made by a county court, directed to a public agent, commanding him to pay a contractor for work done, is revoked by a subse-

quent court, such agent is discharged from a promise to pay such order made before the revocation. *Dey* v. *Lee*, 238.

PURCHASE BY AN OFFICER MAKING A SALE.

A sheriff or other officer cannot purchase at his own sale, either by himself or an agent. *Stewart* v. *Rutherford*, 483.

RAIL ROAD.

Vide SUBSCRIPTION, &c.; NEGLIGENCE; DILIGENCE; REASONABLE CARE.

REASONABLE CARE.

Vide DILIGENCE, &c., 1, 2, 3.

REASONABLE TIME.

Twenty days is not a reasonable time to complete a contract, the parties living within twenty miles, and one being bound and the other not. *Mizell* v. *Burnett*, 249.

RECORDARI.

Where the merits of a case tried before a justice of the peace, are clearly and decidedly for the party cast in the trial, and there were circumstances tending to show fraud and collusion between the successful party and the magistrate, who were brothers, to deprive the former of a fair trial, and of the right to appeal; *Held* that a recordari was proper to be issued, and a new trial should be had. *Lancaster* v. *Brady*, 79.

Vide PLEADING, 3, 4.

REFUNDING BOND.

Vide ASSENT OF AN ADMINISTRATOR.

REGISTRATION.

1. A deed conveying slaves as a gift, but reserving "enough of the hire of the said slaves comfortably to support" the donor, is not a deed in trust, but a deed of gift, and is not required to be registered within six months. The act of 1854, ch. 19, extending the time for registering deeds of gift to two years, applies to one executed April 8th, 1853, a year not having expired from its date to the time of that act's going into operation. *Gordon* v. *Wilson*, 64.

2. A deed in trust to secure a separate use in property to a wife, is not required to be proved and registered within six months, or be void as to creditors and purchasers. *Green* v. *Kornegay*, 66.

3. The certificate of a clerk, endorsed upon a deed, or attached to it, showing that it was proven before him, in his county, followed by an order for registration, is sufficient, without showing that it was taken in his office and a record made of such probate. *Johnson* v. *Pendergrass*, 479.

RELEASE.

Although one whose estate is divested and turned into *mere right*, cannot transfer his right by deed, to a stranger, yet, he may release it to a party in possession. *Williams* v. *Council*, 206.

REPEAL OF A PENAL STATUTE.

Where a penal act, upon which an indictment is founded, is repealed during the pendency of the indictment, the defendant is entitled to an acquittal. *State* v. *Cress*, 421.

RESCINDING AN ORDER.

Vide EXPUNGING A RECORD.

RETURN.

Vide MANDAMUS; SHERIFF.

REVERSION.

Vide LIMITATION OF SLAVES.

ROADS.

1. It is not regular, upon the hearing of exceptions to the report of a jury ordered to lay off a public road, for the court to consider of the propriety of such order. *Anders* v. *Anders*, 243.
2. An appeal from the judgment of a county court, upon exceptions to the report of a jury ordered to lay off a road between certain *termini*, only embraces such exceptions, and does not take up the merits of the petition. *Ibid.*
3. Under the act of 1844, ch. 36, regulating the common schools, a scholar regularly attending a common school, was not bound to work on a public road during a holiday occuring within the period of the session, that is, during the time for which the teacher was employed under the 13th sec. of the same act. *Estes* v. *Oxford*, 474.

Vide CART-WAYS.

SALE OF AN INFANT'S LAND.

1. Before the land of an infant can be sold for debt, under the petition of his guardian, there must be a judgment of court, that there was a debt against the estate of the ward. *Coffield* v. *McLean*, 15.
2. It must also be alleged in a petition for selling an infant's land, that the debt to be satisfied, was one against the ancestor, and not simply a debt contracted by the ward or his guardian. *Ibid.*

SCIRE FACIAS TO SUBJECT BAIL.

1. A suit was brought in the county court, and a bail-bond given for an appearance in that court; there was an appeal and final judgment in the superior court; it was *Held* that a sci. fa., to charge the bail, could only be brought in the superior court. *Turner* v. *White*, 116.
2. In a sci. fa. to subject bail, it is sufficient to set out that there was a judgment, without stating the form of action in which it was obtained. *Ibid.*
3. It is sufficient to allege, generally, in a sci. fa. against bail, that he became bound, as bail, at the time of the execution of the original writ, and liable by virtue of an Act of Assembly. *Ibid.*

SHERIFF.

The words "executed P. R. T., D. Sheriff," endorsed on a *capias*, which duly issued and came to the hands of the sheriff, are so much a due and legal return, as to make the sheriff liable as special bail, on the failure of him, or his deputy, to take a bail-bond. *Washington* v. *Vinson*, 380.

Vide JUDGE AND JURY.

SIGNING.

Vide DEED, 4.

SLANDER.

1. Where, in an action for defamation, it appears that a defendant, authorised by his relation to the party addressed, to make a "privileged communication," in professing to do so, makes a false charge, the inference of malice is against him, and the burden is put upon him to show that he acted *bona fide*. *Wakefield* v. *Swithwick*, 327.
2. Where a party authorised to make a *privileged communication*, stated false matter, and his Honor left it to the jury to say whether, "in communicating what he had heard and believed to be true," he acted in good faith, and there was no evidence that he had heard any thing, nor any as to how he believed, it was held to be error. *Ibid.*
3. The words for which an action of slander was brought were, "that the plaintiff had sworn falsely, in a trial before a justice of the peace, as to an account in his favor against the defendant;" *Held*, that the plaintiff was not bound to show that the justice of the peace, before whom that trial was had, was duly commissioned. *Pugh* v. *Neal*, 367.
4. One who prosecutes another for perjury in swearing to a matter that could not amount to a perjury, (being an immaterial fact,) cannot be protected by proving the truth of his charge. *Smith* v. *Deaver*, 513.

SLAVE—SELLING LIQUORS TO A.

Where a slave handed money to a free negro in a liquor shop, who handed it to the liquor-dealer, and received for it a quantity of spirits, which then and there was handed by him to the slave, it was *Held* that he was not guilty of either *selling* or *giving* the spirits to the slave. *State* v. *Hopkins*, 305. S. P.—*State* v. *Jim Wright*, 308.

SLAVES.

Vide HOMICIDE, 5.

STATUTE OF LIMITATIONS.

1. An interval of twelve months "or thereabouts" in the actual occupation of land, is fatal to a title based upon an adverse possession of seven years, under color of title. *Ward* v. *Herrin*, 23.
2. Where an action of debt is brought on a simple contract, no subsequent promise, however explicit, is sufficient to take it out of the statute of limitations. *Brannock* v. *Bushinell*, 33.

3. Where one receives money as an agent, no cause of action accrues until a demand is made, and consequently, the statute of limitations runs only from that time. *Hyman* v. *Gray*, 155.
4. The proviso for a *new action* within a year after a plaintiff has suffered a nonsuit, as a saving against the statute of limitations, means that there must be the same real parties plaintiff, and the same cause of action in both, but there need not be the same defendant in the new action as in the former; nor does the fact that the new action contains a second count upon the demise of other persons, make any difference. *Williams* v. *Council*, 206.
5. Where a slave is put into the hands of a child, upon the marriage of such child, without any written transfer, and afterwards the parent wills such slave to a third person, upon the death of the parent, the possession of the child becomes adverse towards the legatee, and the statute of limitations runs from that period. *Cotten* v. *Davis*, 416.
6. Where there is a trust, created by the agreement of parties, the possession of the *cestui que trust* is not adverse to that of the trustee, and cannot, no matter how long it has been continued, divest the title of the trustee. *Taylor* v. *Gooch*, 436.
7. Where it was left uncertain whether a possession (relied on to defeat an elder title) began in *February* or *March*, which was insufficient, in law, if it began in the latter month, but good, if in the other, *Held* that the party alleging such possession, was bound to show in which month it began, or he could take no benefit from it. *Edmondston* v. *Shelton*, 451.
8. Where a slave had been entrusted to a distributee, on condition that he would sign and deliver a refunding bond, it was *Held* that the possession of the distributee was not adverse to the administrator. *Howell* v. *Johnston*, 502.
9. There was an agreement to pay a debt in good cash notes, which was barred by the statute of limitations; afterwards, within three years of the bringing of the suit, the plaintiff asked the defendant for the money, to which the defendant said he had paid part of it, and asked how much was the balance, which the plaintiff stated to be a certain sum; the defendant then asked if he could still pay in good cash notes; to which the plaintiff replied he could do so; upon which the defendant said he would settle and make all right: it was *Held* that this took the original promise out of the operation of the statute. *McCurry* v. *McKesson*, 510.
10. Where a promise is barred by the statute of limitations, and a new promise is made between the same parties, to do the same thing, the old promise is revived, and the replication to the statute, will be a general and not a special one. *Ibid.*

STATUTE OF FRAUDS.

1. A promise (not in writing) by an administrator, that he would see a debt of his testator paid, or would pay it, is void under the statute of frauds. *Smithwick* v. *Shepherd*, 196.

2. Under the statute of frauds, a contract, in writing, to sell land, signed by the vendor, is good against him, although the correlative obligation of the buyer to pay the price, is not in writing, and cannot be enforced against him. *Mizell* v. *Burnett*, 249.

3. A contract to make good certain notes on another, received in payment for property sold by the plaintiff to the defendant, provided the maker of such notes was not good for them at a certain day thereafter, is not within the meaning of the statute for the suppression of fraud. *Rowland* v. *O'Rorke*, 337.

SUBSTITUTION.

A purchaser at sheriff's sale, who gets a defective title, has no right, by *substitution*, to take the place of the creditor, and thus bring to his aid the dignity of such creditor's debt. *Laws* v. *Thompson*, 104.

Vide DIGNITY of DEBTS.

SUBSCRIPTION TO RAIL ROAD STOCK.

1. Where a party made a contract, in writing, to take shares of the stock of an incorporated company for constructing a rail-road, under the authority of commissioners, it is not competent for him to prove, by parol, that he made such subscription on a condition as to the location of the road, which had not been complied with. *Rail Road* v. *Leach*, 340.

2. One of the commissioners appointed, with five others, at a given place, to take subscriptions, under the charter of the North-Carolina rail-road company, had no right in doing so, to give any *assurances* as to the line of location that would be adopted for the road. *Ibid.*

3. A stockholder in a rail-road company, who seeks to avoid the payment of his subscription, upon the ground that one of the *termini* was materially changed from that designated in the charter, must show that the alteration was made without his concurrence or consent. *Ibid.*

4. Whether, in this case, if he had objected to the change of the terminus, inasmuch as he had power to prevent it by an injunction or mandamus, the Court would have regarded the defense as valid, Quere? *Ibid.*

SUPREME COURT.

Vide PRACTICE, 3.

TENANCY.

Where a person had rented a place to another to make a crop, in which they were to go halves, the owner furnishing a horse, it was *Held* to be a tenancy, and the tenant might bring trespass against his landlord for forcibly entering and breaking his close. *Hatchell* v. *Kimbrough*, 163.

Vide DAMAGES, 2.

TRESPASS.

Vide JOINT-OWNERSHIP, 2; JOINT-TRESPASSER, 1.

TRUST ESTATE.

Vide STAT. LIM. 6.

USURY.

A negotiable instrument made for the purpose of being sold in the market at the best price, endorsed by the payee in furtherance of that purpose, and sold for cash, by the agent of the maker, at a greater discount than six per cent. per annum, is usurious. *Bynum* v. *Rogers*, 399.

WARRANTY.

A warranty on the sale of a soda-fountain, that it was *in good condition*, is broken, if, from an inherent defect in its construction, existing at the time of the sale, it was liable to get out of order, from time to time, and from that cause failed to answer the purposes for which it was designed, although it was in a condition to make good soda-water on the day of sale. *Pritchard* v. *Fox*, 140.

Vide DAMAGES, 2; JOINT-OWNERSHIP.

WASTE.

It is no objection to an action on the case in the nature of waste, that the reversioner purchased the estate of the particular tenant, after the waste was committed. *Dupree* v. *Dupree*, 387.

WILL.

Where the word *issue* is used in a will, in relation to the interests of a son and three daughters of the testator, and as to the daughters, it is clear from other provisions of the will, (interpreted under a settled rule of law) that *children living at their deaths* are meant, the same meaning must be attributed to it in regard to the son. *Gibson* v. *Gibson*, 425.

Vide DEVISAVIT VEL NON, 1, 2, 3, 4.

WITNESS—COMPETENCY OF.

Vide EVIDENCE, 3, 4, 8, 9, 12, 17.

WRIT OF ERROR.

Vide PLEADING, 3.

Fire

This book must not be taken from the building